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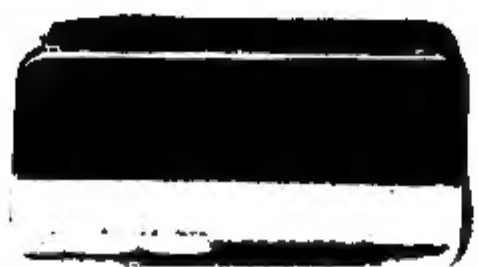
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DEPARTMENT REPORTS

OF THE

STATE OF NEW YORK (S.A.)

CONTAINING THE

DECISIONS, OPINIONS AND RULINGS

OF THE

State Officers, Departments, Boards
and Commissions

AND

MESSAGES OF THE GOVERNOR

OFFICIAL EDITION

WILLIAM V. R. ERVING, Miscellaneous Reporter

VOLUME 10

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STATE OFFICIALS

Corrected to date

(Address, Albany, N. Y., except where otherwise indicated)

1917

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Commissioner.....	William Gorham Rice.
Commissioner.....	Willard D. McKinstry.
Secretary.....	John C. Birdseye.
Assistant Secretary.....	George R. Hitchcock.
Chief Examiner.....	Harold N. Saxton.

CLAIMS, COURT OF

Presiding Judge.....	Fred M. Ackerson.
Judge.....	Thomas F. Fennell.
Judge.....	William W. Webb.
Judge.....	Charles R. Paris.
Judge.....	William D. Cunningham.
Clerk.....	Frederick D. Colson.

CONSERVATION, DEPARTMENT OF

Commissioner.....	George D. Pratt.
Deputy Commissioner.....	Alexander Macdonald.
Secretary.....	Augustus S. Houghton.
Assistant Secretary.....	John J. Farrell.

**BUREAU OF MARINE FISHERIES (New York office Conservation Commission,
Times Building, Times Square).**

Supervisor.....	Emmett B. Hawkins.
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EXCISE, STATE COMMISSIONER OF.....	Herbert S. Sisson.
Deputy Commissioner.....	Jay Farrier.
Second Deputy Commissioner.....	Ernest D. Van Wie.

FISCAL SUPERVISOR OF STATE CHARITIES.....	William A. Mallery, Jr.
Deputy.....	William J. Maier.
Second Deputy.....	Thomas H. Lee.
Chief Clerk.....	William A. Dardess.

HEALTH, STATE DEPARTMENT OF

Commissioner.....	Herman M. Biggs, M. D.
Deputy Commissioner.....	Linsly R. Williams, M. D.
Secretary.....	Matthias Nicoll, Jr., M. D.
Executive Clerk.....	F. D. Beagle.

HEALTH OFFICER PORT OF NEW YORK.....	Leland C. Cofer, M. D.
Office at Quarantine Station	

HIGHWAY DEPARTMENT

Commissioner of Highways.....	Edwin Duffey.
First Deputy.....	H. Eltinge Breed.
Second Deputy.....	Fred W. Sarr.
Third Deputy.....	B. J. Rice.
Secretary.....	Irving J. Morris.
Auditor.....	S. D. Gilbert.

INSURANCE DEPARTMENT

Superintendent of Insurance.....	Jesse S. Phillips.
First Deputy.....	Henry D. Appleton.
Second Deputy (New York office, 165 Broad- way).....	Francis R. Stoddard, Jr.
Chief Clerk.....	Edwin M. Cadman.
Statistician.....	Charles S. Crippen.
Actuary.....	John S. Paterson.
Bureau Chiefs:	
Assessment and Fraternal Corporations...	Thomas F. Behan.
Co-operative Fire.....	George E. Merigold.
Liquidation Bureau.....	Frederick G. Dunham.
Fire Companies (New York office, 165 Broadway).....	Daniel F. Gordon.

INSURANCE DEPARTMENT—(Continued).

Bureau Chiefs—(Continued).

Life Companies (New York office, 165 Broadway).....	Nelson B. Hadley.
Casualty Companies (New York office, 165 Broadway).....	Arthur F. Saxton.
Fraternal Companies (New York office, 165 Broadway).....	John E. Diefendorf.
Workmen's Compensation (New York office, 165 Broadway).....	H. E. Ryan.
Audit (New York office, 165 Broadway)..	Charles Hughes.
Underwriters' Association (New York office, 165 Broadway).....	Samuel Deutschberger.

LABOR, DEPARTMENT OF (Administered by State Industrial Commission).

Chairman.....	John Mitchell.
Commissioner.....	James M. Lynch.
Commissioner.....	Louis Wiard.
Commissioner.....	Edward P. Lyon.
Commissioner.....	Henry D. Sayer.
Acting Secretary.....	C. D. O'Connell.
Assistant Secretary.....	Victor T. Holland.
First Deputy Commissioner in charge of Bureau of Inspection.....	James L. Gernon.
Second Deputy Commissioner in charge of Workmen's Compensation Bureau.....	William C. Archer.
Third Deputy Commissioner in charge of Mediation and Arbitration Bureau.....	Frank B. Thorn.
Chief Counsel.....	Robert W. Bonyngé.
Chief Statistician.....	Leonard W. Hatch.
Director Employment Bureau.....	Charles B. Barnes.
Manager State Insurance.....	F. Spencer Baldwin.

LAW EXAMINERS, BOARD OF

President.....	William P. Goodelle.
Secretary and Treasurer.....	Franklin M. Danaher.
Examiner.....	Frank Sullivan Smith.

MILITARY TRAINING COMMISSION

Commissioner.....	John F. O'Ryan, Maj.-Gen. Commanding the National Guard, State of New York.
Commissioner.....	Dr. John H. Finley, President of University of the State of New York.
Commissioner.....	Dr. George J. Fisher.
Executive Secretary.....	Thomas C. Stowell.
Inspector.....	Thomas A. Story.
Inspector.....	Charles Newell Cobb.
Inspector.....	Daniel Chase.
Inspector.....	Herman J. Norton.

PRISONS, STATE COMMISSION OF

Commissioner.....	Henry Soloman, President.
Commissioner.....	Frank E. Wade, Vice-President.
Commissioner.....	James T. Murphy.
Commissioner.....	Richard M. Hurd.
Commissioner.....	Mrs. Sarah L. Davenport.
Commissioner.....	Rudolph F. Diedling.
Commissioner.....	Allan I. Holloway.
Secretary.....	John F. Tremain.
Chief Clerk.....	Philip G. Roosa.

PRISONS, STATE SUPERINTENDENT OF.....	J. M. Carter.
Chief Clerk.....	George W. Franklin.

PUBLIC SERVICE COMMISSION, FIRST DISTRICT, 120 Broadway, New York City.

Commissioner.....	Oscar S. Strauss, Chairman.
Commissioner.....	William Haywood.
Commissioner.....	Travis H. Whitney.
Commissioner.....	Charles S. Hervey.
Commissioner.....	Henry W. Hodge.
Counsel.....	George S. Coleman.
Secretary.....	James B. Walker.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT

Commissioner.....	Seymour Van Santvoord, Chair'n
Commissioner.....	John A. Barhite.
Commissioner.....	William Temple Emmet.
Commissioner.....	James O. Carr.
Commissioner.....	Frank Irvine.
Counsel.....	Ledyard P. Hale.
Secretary.....	Francis X. Disney.

PUBLIC WORKS, SUPERINTENDENT OF.....	William W. Wotherspoon.
Deputy Superintendent.....	Matthew A. Heeran.

REPORTERS

Court of Appeals.....	J. Newton Fiero.
Deputy.....	Alva S. Newcomb.
Supreme Court.....	Jerome B. Fisher.
Deputy.....	Fletcher W. Battershall.
Miscellaneous.....	William V. R. Erving.

STATE FAIR COMMISSION

Commissioner.....	Charles A. Wieting.
Commissioner.....	Edward B. Long.
Commissioner.....	Calvin J. Huson.
Commissioner.....	W. Averill Harriman.
Commissioner.....	Fred B. Parker.
Commissioner (<i>ex officio</i>).....	Edward Schoeneck, Lieutenant-Governor.
Commissioner (<i>ex officio</i>).....	Charles S. Wilson, Commissioner of Agriculture.

STATE HOSPITAL COMMISSION

Commissioner.....	Charles W. Pilgrim, Chairman.
Commissioner.....	Andrew D. Morgan.
Commissioner.....	Frederick A. Higgins.
Secretary.....	Everitt S. Elwood.
Assistant Secretary.....	Lewis M. Farrington.

STATE LIBRARIAN

Director.....	James I. Wyer, Jr.
Law Librarian.....	John T. Fitzpatrick.

STATE PROBATION COMMISSION

.....	Homer Folks, President.
Commissioner.....	Frank E. Wade, Vice-President.
Commissioner.....	Alphonso T. Clearwater.
Commissioner.....	Edward C. Blum.
Commissioner.....	Edmund J. Butler.
Commissioner.....	Henry Marquand.
Commissioner.....	John Huston Finley, <i>ex officio</i> .
Secretary.....	Charles L. Chute.

STATE TAX COMMISSIONERS

Commissioner.....	Martin Saxe.
Commissioner.....	Walter H. Knapp.
Commissioner.....	Ralph W. Thomas.
Secretary.....	Horace G. Tenant.
Counsel.....	Charles R. McSparren.

STATE MUSEUM

Director.....	John M. Clarke.
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UNIVERSITY OF THE STATE OF NEW YORK

REGENTS, BOARD OF

Chancellor.....	Pliny T. Sexton, LL.B., LL.D., Palmyra.
Vice-Chancellor.....	Albert Vander Veer, M.D., M.A., Ph.D., LL.D., Albany.
Regent.....	C. B. Alexander, M.A., LL.B., LL.D., Lit.D., New York.
Regent.....	Chester S. Lord, M.A., LL.D., New York.
Regent.....	William Nottingham, M.A., Ph.D., LL.D., Syracuse.
Regent.....	William Berri, Brooklyn.
Regent.....	Walter Guest Kellogg, B.A., Ogdensburg.
Regent.....	Francis M. Carpenter, Mount Kisco.
Regent.....	Abram I. Elkus, LL.B., D.C.L., New York.
Regent.....	Adelbert Moot, Buffalo.
Regent.....	John Moore, Elmira.
Regent.....	James Byrne, New York.

COMMISSIONER OF EDUCATION.....	John H. Finley.
Deputy Commissioner.....	Thomas E. Finegan.
First Assistant Commissioner.....	Augustus S. Downing.
Second Assistant Commissioner.....	Charles F. Wheelock.
Counsel.....	Frank B. Gilbert.
Chiefs of Divisions:	
Administration Division.....	George M. Wiley.
Attendance Division.....	James D. Sullivan.
Education Extension Division.....	William R. Watson.
Examination Division.....	Harlan H. Horner.
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Inspection Division.....	Frank H. Wood.
Library School Division.....	Frank K. Walter.
School Library Division.....	Sherman Williams.
Statistical Division.....	Hiram C. Case.
Visual Instruction Division.....	Alfred W. Abrams.
Department of Agricultural and Industrial Education.....	Arthur D. Dean (Director).

THE LEGISLATURE

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SENATORS 1917

With Politics, Occupation and Post-Office Address of Each

HON. EDWARD SCHOENECK, *Lieutenant-Governor and President of the Senate, Syracuse, N. Y.*
Home Post-office, 431 Union Bldg., Syracuse, N. Y.

ELON R. BROWN, *Temporary President, Albany, N. Y.* *Home Post-office, Watertown, N. Y.*

ERNEST A. FAY, *Clark, Albany, N. Y.* *Home Post-office, Potsdam, N. Y.*

DIST.	NAMES	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
1.	George L. Thompson.....	Republican	Merchant.....	8
2.	Peter M. Daly.....	Democrat...	Lawyer.....	34
3.	Thomas H. Cullen.....	Democrat...	Marine insurance..	24
4.	Charles C. Lockwood.....	Republican..	Lawyer.....	94
5.	William J. Heffernan.....	Democrat...	Real estate.....	54
6.	Charles F. Murphy.....	Republican..	Lawyer.....	24
7.	Daniel J. Carroll.....	Democrat...	Manufacturer.....	14
8.	Alvah W. Burlingame, Jr..	Republican..	Lawyer.....	34
9.	Robert R. Lawson.....	Republican..	.....	24
10.	Alfred J. Gilchrist.....	Republican..	Lawyer.....	24
11.	Bernard Downing.....	Democrat...	Stenographer.....	14
12.	Jacob Koenig.....	Democrat...	.....	24
13.	James J. Walker.....	Democrat...	Lawyer.....	6
14.	James A. Foley.....	Democrat...	Lawyer.....	64
15.	John J. Boylan.....	Democrat...	Real estate appraiser..	44
16.	Robert F. Wagner.....	Democrat...	Lawyer.....	24
17.	Orden L. Mills.....	Republican..	Lawyer.....	34
18.	Albert Ottinger.....	Republican..	Lawyer.....	14
19.	Edward J. Dowling.....	Democrat...	Lawyer.....	14
20.	Salvatore A. Cotillo.....	Democrat...	Lawyer.....	24
21.	John J. Dunnigan.....	Democrat...	Architect and builder..	14
22.	John V. Sheridan.....	Democrat...	Lawyer.....	City 3118 Webster ave., N. Y.
23.	George Cromwell.....	Republican..	Lawyer.....	City. Dongan Hills, Richmond Co., N. Y.
24.	George A. Slater.....	Republican..	Lawyer.....	Port Chester, N. Y.
25.	John D. Stivers.....	Republican..	Editor and publisher..	Middletown, N. Y.
26.	James E. Townner.....	Republican..	Real estate.....	Townner, N. Y.
27.	Charles W. Walton.....	Republican..	Lawyer.....	Kingston, N. Y.
28.	Henry M. Sage.....	Republican..	Land and timber busi- ness.....	Menands, N. Y.
29.	George B. Wallington.....	Republican..	Lawyer.....	8 Walnut place, Troy, N. Y.
30.	George H. Whitney.....	Republican..	Pharmacist.....	118 No. 2nd ave., Mechanis- ville, N. Y.
31.	James W. Yelverton.....	Republican..	Banker.....	217 Union st., Schenectady, N. Y.
32.	Theodore Douglas Robinson	Republican..	Farmer.....	Mohawk, R. F. D. 1.
33.	James A. Emerson.....	Republican..	Banker.....	Warrensburg, N. Y.
34.	N. Monroe Marshall.....	Republican..	Banker.....	Malone, Franklin Co., N. Y.
35.	Elon R. Brown.....	Republican..	Lawyer.....	124 Clinton st., Watertown, N. Y.
36.	Charles W. Wicks.....	Republican..	Farmer.....	Sauquoit, Oneida Co., N. Y.
37.	Adon P. Brown.....	Republican..	Lawyer.....	Leonardsville, N. Y.
38.	J. Henry Walters.....	Republican..	Lawyer.....	935 University Block., Syra- cuse, N. Y.
39.	William H. Hill.....	Republican..	Editor and publisher..	Johnson City, N. Y.
40.	Charles J. Hewitt.....	Republican..	Banker.....	Locks, N. Y.
41.	Morris S. Halliday.....	Republican..	Lawyer.....	510 East Seneca st., Ithaca, N. Y.
42.	William A. Carson.....	Republican..	Retired merchant ..	Rushville, Yates Co., N. Y.
43.	Charles D. Newton.....	Republican..	Lawyer.....	Geneseo, Livingston Co., N. Y.
44.	John Knight.....	Republican..	Lawyer.....	Arcade, Wyoming Co., N. Y.
45.	George F. Argatzinger.....	Republican..	Manufacturer.....	683 Averill ave., Rochester, N. Y.
46.	John B. Mullan.....	Republican..	Insurance.....	9 Elwood Bldg., Rochester, N. Y.
47.	George F. Thompson.....	Republican..	Lawyer.....	Middleport, Niagara Co., N. Y.
48.	Ross Graves.....	Republican..	Insurance.....	683 Manchester pl., Buffalo, N. Y.
49.	Samuel J. Ramsperger.....	Democrat...	Bookkeeper.....	232 Emalie st., Buffalo, N. Y.
50.	Leonard W. H. Gibbs.....	Republican..	Lawyer.....	110 Franklin st., Buffalo, N. Y.
51.	George E. Spring.....	Republican..	Lawyer.....	Franklinville, N. Y.

MEMBERS OF ASSEMBLY, 1917

With Politics, Occupation and Post-Office Address of Each

THADDEUS C. SWEET, *Speaker, Albany, N. Y. Home Post-office, Phoenix, N. Y.*
FRED W. HAMMOND, *Clerk, Albany, N. Y. Home Post-office, Syracuse, N. Y.*

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
ALBANY				
1	Clarence F. Welsh.....	Republican.	Certified shorthand re- porter.....	43 So. Allen st., Albany.
2	John G. Malone.....	Republican.	Electrical contractor...	25 Howard st., Albany.
3	William C. Baxter.....	Republican.	Coal merchant.....	1803 Third ave., Watervliet.
ALLEGANY				
	William Duke, Jr.....	Republican.	Lumber dealer and oil producer.....	Wellsville.
BRONX				
32	N. Y. C. William S. Evans.	Democrat...	Lawyer.....	46 Cedar st., N. Y. City.
33	N. Y. C. Earl H. Miller....	Democrat...	Wholesale lumber.....	601 Eagle ave., N. Y. City.
34	N. Y. C. M. Maldwin Fertig	Democrat...	Lawyer.....	1389 Stebbins ave., N. Y. City.
35	N. Y. C. Joseph M. Callahan	Democrat...	Lawyer.....	1037 Ogden ave., N. Y. City.
BROOME				
	Edmund B. Jenks.....	Republican.	Lawyer.....	Whitney Point.
CATTARAUGUS				
	De Hart H. Ames.....	Republican.	Real estate and loans..	Franklinville.
CAYUGA				
	L. Ford Hager.....	Republican.	Farming.....	Red Creek.
CHAUTAUQUA				
1	Leon L. Fancher.....	Republican.	Lawyer.....	Jamestown.
2	Joseph A. McGinnies.....	Republican.	Mg'r. Chaut. and Erie Grape Co.....	Ripley.
CHEMUNG				
	Robert P. Bush.....	Democrat...	Physician.....	Horseheads.
CHENANGO				
	Bert Lord.....	Republican.	Merchant.....	Afton.
CLINTON				
	Wallace E. Pierce.....	Republican.	Lawyer.....	Plattsburgh.
COLUMBIA				
	William W. Chace.....	Republican.	Lawyer.....	Hudson.
CORTLAND				
	George H. Wiltsie.....	Republican.	Dry goods merchant...	Cortland.
DELAWARE				
	James S. Allen.....	Republican.	Real estate and farmer.	East Branch.
DUTCHESS				
1	James C. Allen.....	Republican.	Farmer.....	Clinton Corners.
2	Frank L. Gardner.....	Republican.	Insurance.....	Poughkeepsie.
ERIE				
1	Alexander Taylor.....	Republican.	Lawyer.....	115 Franklin st., Buffalo.
2	John W. Slacer.....	Republican.	Chief clerk, Buffalo Malleable Iron and Steel Co.....	1203 West ave., Buffalo.
3	Nicholas J. Miller.....	Republican.	Manf'r. Willow Ware..	12 Cayuga st., Buffalo.
4	James M. Mead.....	Democrat...	Electrician.....	350 Gold st., Buffalo.
5	John A. Lynch.....	Democrat...	Lawyer.....	694 So. Division st., Buffalo.
6	Alexander A. Patrzykowski.	Democrat...	Retail liquor dealer....	1119 Broadway, Buffalo.
7	Earl G. Danser.....	Republican.	Physician.....	592 Walden ave., Buffalo.
8	Herbert A. Zimmerman....	Republican.	Lawyer.....	721 Brisbane Bldg., Buffalo.
9	Nelson W. Cheney.....	Republican.	Farmer.....	Eden.

MEMBERS OF ASSEMBLY — (Continued).

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
ESSEX				
	Raymond T. Kenyon.....	Republican.	Dentist.....	Ausable Forks.
FRANKLIN				
	Warren T. Thayer.....	Republican.	Manufacturer.....	Chateaugay.
FULTON-HAMILTON				
	Burt Z. Kasson.....	Republican.	Civil engineer and farmer.....	Gloversville.
GENESEE				
	Louis H. Wells.....	Republican.	Farmer and merchant..	Pavilion.
GREENE				
	Harding Showers.....	Republican.	Civil engineer, Lumber and coal business....	Tannersville.
HERKIMER				
	Edward O. Davies.....	Republican.	Launderer.....	Ilion.
JEFFERSON				
1	H. Edmund Machold.....	Republican.	Farmer.....	Ellisburg.
2	Willard S. Augsburg.....	Republican.	Farmer.....	Antwerp.
KINGS				
1	George H. Ericson.....	Republican.	Undertaker.....	535 Atlantic ave., Brooklyn.
2	Patrick H. Larney.....	Democrat...	Printer.....	252 High st., Brooklyn.
3	Frank J. Taylor.....	Democrat...	Real estate.....	50 Van Dyke st., Brooklyn.
4	Peter A. McArdle.....	Democrat...	Real estate.....	151 Hewes st., Brooklyn.
5	James H. Caulfield, Jr.....	Republican.	Investigator.....	872 Madison st., Brooklyn.
6	Nathan D. Shapiro.....	Republican.	Lawyer.....	892 Broadway, Brooklyn.
7	Daniel F. Farrell.....	Democrat...	Hatter.....	378 17th st., Brooklyn.
8	John J. McKeon.....	Democrat...	Real estate.....	413 Smith st., Brooklyn.
9	Frederick S. Burr.....	Democrat...	Real estate broker....	8723 Ridge Boul'd. B'klyn.
10	Fred M. Ahern.....	Republican.	Lawyer.....	426 Park pl., Brooklyn.
11	George R. Brennan.....	Republican.	Lawyer.....	1140 Pacific st., Brooklyn.
12	William T. Simpson.....	Republican.	Lawyer.....	523 6th st., Brooklyn.
13	Morgan T. Donnelly.....	Democrat...	Lawyer.....	101 Powers st., Brooklyn.
14	John P. La Frens.....	Democrat...	Mg'r. cooperage dept..	65 Java st., Brooklyn.
15	Jeremiah F. Twomey.....	Democrat...	Pharmacist.....	151 Java st., Brooklyn.
16	Samuel R. Green.....	Republican.	Wholesale druggist....	1446 46th st., Brooklyn
17	Frederick A. Wells.....	Republican.	Cigar manufacturer....	215 Montague st., Brooklyn
18	Wilfred E. Youker.....	Republican.	Lawyer.....	310 Kenmore pl., Brooklyn.
19	Benjamin Klingmann.....	Democrat...	Real estate.....	187 Irving ave., Brooklyn.
20	August C. Flamman.....	Republican.	Lawyer.....	44 Court st., Brooklyn.
21	Joseph A. Whitehorn.....	Socialist....	Lawyer.....	235a Vernon ave., Brooklyn.
22	Charles H. Duff.....	Republican.	Mf'r. of dies and tools.	1397 Madison st., Brooklyn.
23	Abraham I. Shiplacoff.....	Socialist....	Manager labor union...	759 Howard ave., Brooklyn.
LEWIS				
	Henry L. Grant.....	Republican.	Cheese merchant.....	Copenhagen.
LIVINGSTON				
	George F. Wheelock.....	Republican.	Farmer.....	Moscow.
MADISON				
	Morell E. Tallett.....	Republican.	Coal and produce.....	De Ruyter
MONROE				
1	James A. Harris.....	Republican.	Fruit grower.....	East Rochester, R. F. D. No 2.
2	Simon L. Adler.....	Republican.	Lawyer.....	813 Wilder Bldg., Rochester.
3	Harry B. Crowley.....	Republican.	Insurance agent.....	105 Woodward st., Rochester.
4	Frank Dobson.....	Republican.	Farming.....	Rochester, Charlotte Sta.
5	Franklin W. Judson.....	Republican.	Farmer.....	R. F. D. Lincoln Park.
MONTGOMERY				
	Erastus Corning Davis.....	Republican.	Merchant and mf'r....	Fonda.
NASSAU				
	Thomas A. McWhinney....	Republican.	Automobile business...	Lawrence.
NEW YORK				
1	John J. Ryan.....	Democrat...	Managing law clerk....	574 Broome st., N. Y. City.
2	Peter J. Hamill.....	Democrat...	Clerk.....	262 William st., N. Y. City.
3	Caesar B. F. Barra.....	Democrat...	Lawyer.....	53-61 Park Row, N. Y. City.
4	Henry S. Schimmel.....	Democrat...	Lawyer.....	302 Broadway, N. Y. City.

MEMBERS OF ASSEMBLY — (Continued).

5 Maurice McDonald.....	Democrat..	Real estate.....	
6 Nathan D. Perlman.....	Republican..	Lawyer.....	
7 Peter P. McElligott.....	Democrat..	Lawyer.....	
8 Abraham Goodman.....	Democrat..	Teacher, lawyer.....	
9 Charles D. Donohue.....	Democrat..	Lawyer.....	
10 Abner Greenberg.....	Democrat..	Lawyer.....	
11 James F. Mahony.....	Democrat..	Insurance.....	
12 Joseph D. Kelly.....	Democrat..	Lawyer.....	
13 Fredolin F. Straub.....	Democrat..	Electrical contractor.....	
14 Robert L. Tudor.....	Democrat..	Publisher.....	
15 Abram Ellenbogen.....	Republican..	Lawyer.....	
16 Martin G. McCue.....	Democrat..	Real estate.....	
17 Martin Bourke.....	Republican..	Lawyer.....	
18 Mark Goldberg.....	Democrat..	Lawyer.....	
19 Perry M. Armstrong.....	Democrat..	Lawyer.....	
20 Frank Aronow.....	Democrat..	Lawyer.....	
21 Harold C. Mitchell.....	Republican..	Lawyer.....	
22 Maurice Bloch.....	Democrat..	Lawyer.....	
23 Earl A. Smith.....	Democrat..	Lawyer.....	
24 Owen M. Kiernan.....	Democrat..	Advertising.....	
25 Robert McC. Marsh.....	Republican..	Lawyer.....	
26 Meyer Levy.....	Democrat..	Lawyer.....	
27 Schuyler M. Meyer.....	Republican..	Lawyer.....	
28 Charles Novello.....	Republican..	Lawyer.....	
29 Alfred D. Bell.....	Republican..	Real estate.....	
30 Timothy F. Gould.....	Democrat..	Merchant.....	
31 Jacob Goldstein.....	Democrat..	Lawyer.....	
NIAGARA			
1 William Bewley.....	Republican..	Manufacturer.....	Lockport
2 Alan V. Parker.....	Republican..	Lawyer.....	Niagara Falls.
ONEIDA			
1 Albert H. Geisbrecht.....	Democrat..	Merchant.....	904 Cornelia st., Utica.
2 Louis M. Martin.....	Republican..	Lawyer.....	Clinton.
3 George T. Davis.....	Republican..	Lawyer.....	Willett block, Rome.
OSWEGO			
1 Manuel J. Soule.....	Republican..	Farmer.....	Euclid.
2 Harley J. Crane.....	Republican..	Lawyer.....	204 Landon ave., Syracuse.
3 George R. Fenton.....	Republican..	Lawyer.....	614 Gurney bldg., Syracuse.
ONTARIO			
Heber B. Wheeler.....	Republican..	Merchant..	Holcomb.
ORANGE			
1 William F. Brush.....	Republican..	Auction'r and appraiser.....	142 Chambers st., Newburgh
2 Charles L. Mead.....	Republican..	Lawyer.....	Middletown.
ORLEANS			
Frank H. Lattin.....	Republican..	Physician, fruit grower.....	Albion.
OSWEGO			
Thaddeus C. Sweet.....	Republican..	Paper manufacturer..	Phoenix.
OTSEGO			
Allen J. Bloomfield.....	Republican..	Summer hotel business.....	Richfield Springs.
PUTNAM			
John P. Donohoe.....	Republican..	Real estate.....	Garrison.
QUEENS			
1 Peter A. Leininger.....	Democrat..	Real estate and insurance.....	640 Academy st., Long Island City.
2 Peter J. McGarry.....	Democrat..	Real estate.....	71 Greenpoint ave., Long Island City.
3 William H. O'Hare.....	Democrat..	Lawyer.....	33 Parkview ave., Glendale, Long Island.
4 Frank E. Hopkins.....	Republican..	Pres. The Marion Press.....	32 Willett st., Jamaica.
RENEWARK			
1 John F. Shannon.....	Democrat..	Electrician.....	361 Congress st., Troy.
2 Arthur Cowee.....	Republican..	Gladiolus specialist and farmer.....	Berlin.

MEMBERS OF ASSEMBLY — (Concluded).

Dist.	NAME	POLITICS	OCCUPATION	POST-OFFICE ADDRESS
	RICHMOND			
	Henry A. Seesselberg.....	Democrat...	Banker.....	12 Pierce st., Stapleton.
	ROCKLAND-			
	William A. Serven.....	Republican.	Lumber and banker....	Pearl River.
	ST. LAWRENCE			
1	Frank L. Seaker.....	Republican.	Farmer.....	Gouverneur.
2	Edward A. Everett.....	Republican.	Lawyer.....	Potsdam.
	SARATOGA			
	Gilbert T. Seelye.....	Republican.	Farmer.....	Burnt Hills.
	SCHENECTADY			
	Walter S. McNab.....	Republican.	Lawyer.....	514 State st., Schenectady.
	SCHOHARIE			
	George A. Parsons.....	Democrat...	Farmer.....	Sharon Springs.
	SCHUYLER			
	Henry J. Mitchell.....	Republican.	Real estate and loans..	Odessa.
	SENECA			
	Lewis W. Johnson.....	Republican.	Foreman machine shop.	Seneca Falls.
	STEUBEN			
1	Samuel E. Quackenbush....	Republican.	Real estate and insur- ance.....	119 E. 5th st., Corning.
2	Richard M. Prangen.....	Republican.	Ice business.....	Hornell.
	SUFFOLK			
1	DeWitt C. Talmage.....	Republican.	Farmer.....	East Hampton.
2	Henry A. Murphy.....	Republican.	Real estate and insur- ance.....	Huntington.
	SULLIVAN			
	Seymour Merritt.....	Democrat..	Salesman.....	Liberty.
	TIOGA			
	Daniel P. Witter.....	Republican.	Farmer and teacher of scientific agriculture	Berkshire.
	TOMPKINS			
	Casper Fenner.....	Republican.	Farmer.....	Heddens.
	ULSTER			
1	Joel Brink.....	Republican.	General merchant.....	Lake Katrine.
2	Abram P. Lefevre.....	Republican.	Coal, feed and lumber.	New Paltz.
	WARREN			
	Henry E. H. Brereton.....	Republican.	Farmer.....	Lake George.
	WASHINGTON			
	Charles O. Pratt.....	Republican.	Lawyer and farmer....	Cambridge.
	WAYNE			
	Frank D. Gaylord.....	Republican.	Fruit packer and canner	Sodus.
	WESTCHESTER			
1	George Blakely.....	Republican.	Bricklayer and plas- terer.....	5 Hamilton ave., Yonkers.
2	William S. Coffey.....	Republican.	Lawyer.....	Mount Vernon.
3	Walter W. Law, Jr.....	Republican.	Real estate.....	Briarcliffe Manor.
4	Floy D. Hopkins.....	Republican.	Title insurance.....	White Plains.
	WYOMING			
	Bert P. Gage.....	Republican.	Farmer.....	Warsaw.
	YATES			
	Howard S. Fullagar.....	Republican.	Farmer and fruit grower	Penn Yan.

GOVERNOR'S MESSAGES

ANNUAL MESSAGE

Transmitted to the Legislature, January 3, 1917

I desire to lay before you in this message, among other matters, recommendations for the furtherance of the reforms in State finance begun by the adoption of the itemized form of appropriation act last year; a report of an investigation relative to food supplies and the high cost of living; a summary of a thorough investigation of the State charitable institutions, together with a statement and recommendations prepared by the State Board of Charities and filed with me on December twenty-sixth; certain matters of policy with regard to the competitive civil service of the State; recommendations for the advancement of the activities of the National Guard and the physical and military training in our schools; an analysis of the so-called Federal Aid to State highways together with a suggestion for the development of resources now in the possession of the State available for the production of road-making and building material; a report upon the progressive plans of the State for prison reform and construction; and the suggestion that the State should demonstrate that it is a model employer by insuring all its employees for compensation in case of injury or death resulting from service for the State.

Investigations have been conducted during the last weeks and months relative to food supplies and the high cost of living.

The legislative committee, of which Senator Wicks is chairman, has been almost constantly at work since the adjournment of the Legislature of 1915 and has obtained much valuable information.

The mayor of New York some time ago appointed a citizens' committee to consider the subject of food supplies as it affects the city of New York, placing Mr. George W. Perkins at the head of that committee.

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I appointed on the first of December, a committee to assist the Executive and the Legislature in investigating and preparing recommendations as to legislation on this subject. This committee was composed of Mr. George W. Perkins, Senator Charles W. Wicks, Judge George W. Ward, counsel for the legislative committee, Mr. S. J. Lowell, master of the State Grange, and Mr. Clifford S. Sims, vice-president and general manager of the Delaware and Hudson Railroad Company.

I am very glad to inform your honorable body that these three committees have worked in perfect harmony and that they have united in a report which was filed with me on the twenty-eighth of December.

I transmit herewith the report, and shall ask the privilege of communicating with you and of conferring with committees from the Senate and Assembly on the subject at a later date.

Under the terms of chapter 130 of the Laws of 1916, the Governor is required to submit to your honorable body, a statement of the total amount of appropriations desired by each State department, commission, board, bureau, office and institution, and may, at the same time, make such suggestions for reductions and additions thereto, as he deems proper. He may also, at the same time, submit as a part of such statement, an estimate of the probable resources of the State for the ensuing fiscal year.

In compliance with this act, I transmit to you as a part of this message, a budget estimate for the next fiscal year including estimates of revenues and treasury resources based upon data, prepared by the State Comptroller, a tentative appropriation act representing my estimate of the expenses of government for the next fiscal year, together with a compilation of desired appropriations by which the tentative appropriation bill may be analyzed in terms of the departmental requests.

As a part also, of this budget estimate, I have included a recommendation for a policy of State expenditure for the proper housing of the helpless and dependent charges of the State. I have, also in this estimate, discussed such items of expense, now mandatory as may be reduced by legislation; also those reforms in

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the present method of State finance generally which may be considered at this time.

STATE CHARITABLE INSTITUTIONS

The division of authority and responsibility in the management of the State charitable institutions has impressed me most unfavorably and seems to me responsible, to a large degree, for a lack of adequate results in this important branch of the State service. No less than six different commissions and officials have important duties in relation to these institutions. Having in mind the desirability of substituting a simple, clear and efficient system for this tangle of complexities, I appointed Mr. Charles H. Strong as a commissioner to inquire into the actual operations of all the State departments, boards, commissions, and officials dealing with these institutions. Commissioner Strong made a very thorough investigation of the entire subject and reported to me in October last a plan which, in his judgment, would remove all these uncertainties, overlapping of duties and consequent interminable delays, both in the establishment and in the subsequent operation of State charitable institutions. I shall transmit this report to you, together with a statement and recommendations, relative to the whole subject, prepared by the State Board of Charities and filed with me on December twenty-sixth.

I ask you to give the subject your most serious consideration. It seems to me highly important that a unified, direct and simple plan of administration of the State charitable institutions be adopted.

I desire to communicate with you and to confer with the committees from the Senate and Assembly on this subject later.

CIVIL SERVICE

In the budget estimate accompanying this message, I will take up in detail my discussion of the recommendations of the Senate civil service committee, but in this more general part of my message to your honorable body, I desire to say that it is gen-

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erally recognized that the standardization of the titles, duties and salaries of civil service employees along modern business lines is necessary and would result in large economies and more efficient service. The valuable work of the civil service committee of the Senate during the past two years should not be wasted, but should be used as the foundation for improvements in administration.

NATIONAL GUARD AND PHYSICAL AND MILITARY TRAINING

The National Guard appropriations which I have recommended in my tentative appropriation act are larger than the State has ever made before. I believe, however, that the duty of our State in this respect is clear. The men of our National Guard have been guaranteed by our State law a certain fixed daily compensation when on active service in the State of New York. When the Government of the United States called for the military assistance of the State of New York for service on the Mexican border, our State soldiers, under the Federal pay regulations, were entitled to only fifty cents a day from the Federal Government, as against \$1.25 a day pay to which they were entitled had they been serving within the borders of the State. I believe that the State of New York should shoulder cheerfully the financial burden of that difference in per diem pay.

All other such necessary expenditures for the National Guard I recommend to your honorable body, as not only necessary, but right and proper expenditures.

The work of the Military Training Commission, the establishment of which last year was the contribution of our State to the real preparedness of the Nation, I recommend should be continued and expanded according to the requests of the Commission. It offers, I believe, the best possible opportunity for the expression of our fidelity as a State to National ideals.

LOCAL OPTION

It has been the policy of the State to grant to the towns of the State the right to determine by the vote of the electorate the

Transmitted to the Legislature, January 3, 1917

question as to whether the sale of intoxicating liquors shall be permitted within their borders. In accordance with this policy I believe that the same privilege should be extended to the cities of the State.

The Legislature must keep in mind, however, that any curtailment of the liquor traffic involves a reduction of the revenues of the State, and that in the event of the reduction of the number of licensed saloons, proper provision must be made to meet such reduction in revenues.

I submit herewith a statement of the revenues obtained through the Excise Department during the five years last past:

1911-12	October 1 to September 30.....	*\$18,210,083 89
1912-13	October 1 to September 30.....	*18,142,557 69
1913-14	October 1 to September 30.....	*18,109,270 61
1914-15	October 1 to September 30.....	*17,766,783 17
1915-16	October 1 to September 30.....	†21,068,145 20

FEDERAL AID TO STATE HIGHWAYS

Congress passed, during the last session, and the President approved, a law providing for Federal aid for the construction of rural post roads. The total amount which, under its terms the Federal Government is to expend during the next five years, is \$75,000,000. The expenditure of a State's share of this sum is conditioned upon the appropriation by such State of a like amount for the construction of roads agreed upon by the Secretary of Agriculture and the State Highway Department. If the State fails to make the appropriation, of course, it does not receive its share of the \$75,000,000. Even if the State of New York refuses to provide its share of the allotment — which amounts to \$3,877,500 covering a period of five years — in the following amounts:

* Of these amounts the State received one-half and the towns or cities received one-half.

† Chapter 672, Laws of 1915, provided further taxation of traffic in liquors — rate advanced one-quarter over amount prescribed by Liquor Tax Law, and the whole amount of such advance (except amount allowed for collecting same) to be paid into the State Treasury.

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1916.....	\$258,500
1917.....	517,000
1918.....	775,500
1919.....	1,034,000
1920.....	1,292,500

— the State will still be called upon to pay its share of the funds to be raised by taxation to provide resources to finance the Federal Government's part of the plan, which provides that if any State fails to assent, its share shall be divided among the remaining States which have assented.

The passage of this act has placed a burden, amounting to approximately \$29,000,000 upon the State of New York, as against a return, in the form of Federal aid, amounting only to \$3,877,500. It is not even necessary to comment on the unfairness of the proposition.

After careful study, I feel it is my duty to recommend to your honorable body that you assent to such plan, in order that our State may at least receive the comparatively small amount that has been offered to it as the outcome of this unfair discrimination.

Another reason for my recommendation is that the expenditure of the money which will result from the State's acceptance of this plan will enable it, in a very satisfactory way, substantially to complete its system of State and county highways.

In 1905, by constitutional amendment, \$50,000,000 was voted for the improvement of public highways, and in 1907 the Legislature adopted a proposed system to be improved with such funds. In 1909, this system was enlarged by the addition of a system of proposed State routes. The first appropriation was inadequate for the building of such combined systems, and in 1912 the people voted another appropriation of \$50,000,000 which was not sufficient to cover the entire mileage of the combined systems referred to.

While the amount to be expended under the plan of Federal aid will not complete the so-called State system, as laid out by the Legislature in 1907 and the system of State highways added thereto in 1909, yet after careful study of the subject, I find

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that by a wise and proper location of the Federal aid roads, combined in some cases possibly with a readjustment of the State and county systems, it will be possible to make such connections as could not be made otherwise owing to lack of funds, and thus provide, when all completed, a comprehensive system including all the main market roads and state-wide thoroughfares throughout the entire State.

From a state-wide standpoint, the thing desired is such a completely connected system. By this means it can be substantially secured. While we may not say what the future policy of the State will be in regard to any further improvement of roads, nevertheless, in this way the State will acquire at the earliest moment possible a distinctly comprehensive, connected and complete system.

In view of the financial condition of the State, I have given special study to the question of providing the necessary funds to meet the State's payments under the act of Congress.

As I have said before, the State's share for the present fiscal year, which must be available prior to July first, amounts to \$258,500. This must be provided in this year's budget. I have not, however, included it in the proposed Appropriation Act, as it is necessary for your honorable body to decide whether it will assent to the plan for Federal aid.

PROVISION FOR ROAD MAKING AND BUILDING MATERIALS FOR STATE DEPARTMENTS

During the past year the Highway Department and the local authorities have been unable to obtain a sufficient supply of crushed stone for road work, and have also been forced to pay a very high price for such material. Without interfering in any way with legitimate business or with labor, by reason of the scarcity thereof, the State can successfully operate a stone quarry at Great Meadow Prison with inmate labor. At the present time there is being operated a small quarry at Great Meadow Prison. This experiment shows that the State would be justified in making an appropriation to provide for increased facilities for furnishing stone which may be used not only by the Highway Department,

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but by other State Departments in building operations. This prison is exceptionally well located for the operation of a quarry. There is practically an unlimited supply of high grade limestone on the prison property, and transportation facilities are furnished by both a trunk line railroad and the barge canal which has recently been opened.

If a plant for this purpose is installed and put in operation, it will on the one hand afford proper and desirable employment for a portion of the prison inmates, and on the other hand assist the State Departments referred to in procuring such needed material, and I recommend that provision be made therefor.

STATE PRISONS

The Commission which I appointed pursuant to the provisions of chapter 594 of the Laws of 1916 will soon select a site for a new prison and proceed to erect additional accommodations for those confined in State's prisons. It is essential that adequate appropriations be made to carry on this necessary work.

As a solution of the problem of the unsatisfactory conditions at Sing Sing that has confronted the State of New York for decades, I recommended the establishment of a classification prison at Ossining to take the place of the present retention prison and its objectionable cell block. Following a series of public hearings, a plan that meets the demands of all interested in the improvement of conditions has been developed.

We should create better prison conditions, build better prisons, and make if possible, of the inmates, better men.

In swinging away from the brutal, it is not necessary to swing into the maudlin. It is possible to think of the rights of the prisoner without forgetting the rights of society. The essential feature of any sound system of prison reform is iron discipline.

This kind of prison reform is necessary, not only because it is right but because it is better business. Common sense and decency dictate it. Rightly conceived and properly administered, prison reform is social insurance. Not the least drawback to intelligent progress has been the revulsion against well-meaning theorists

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who have tried to proceed through sentiment instead of through system.

The majority of those who compose our prison population have had no discipline in their lives, and the first task is to teach them respect for law, obedience to established authority, habits of order and industry.

While we must house the criminal well, we must not make him feel that he has become an object of interest simply because he has done wrong.

Regarding the question of selection of site and development of plans for a new prison to be placed either at Wingdale or Beekman in Dutchess county, detailed surveys have been made of both sites and thorough investigations have been undertaken for the purpose of reaching a determination as to the sufficiency of water supply and the possibilities of sewage disposal. The present statute limits the Commission on New Prisons to the use of one of the named sites. As a result of the scientific study of the classification scheme under way at Ossining, it is proposed to establish a new farm prison for the care of feeble-minded criminals.

WORKMEN'S COMPENSATION

At the last session of the Legislature numerous amendments were made to the Workmen's Compensation Act. These amendments not only strengthened and improved the compulsory provisions of the law but they extended its benefits to many classes of employments not theretofore covered by it. In addition to this broadening of the scope of the compulsory provisions of the act the Legislature enacted, and it was my privilege to approve, an amendment to the law providing that the employers and workmen engaged in a business or industry not covered by the compulsory provisions of the law might elect to make themselves subject to these provisions.

The Workmen's Compensation Act was further amended so as to include all employments enumerated in section 2 of the act carried on by the State or political subdivisions thereof, notwithstanding the definition of the term *employment* in subdivision 5

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of section 3 of the law. The effect of this amendment was to make it compulsory upon the State and all political subdivisions thereof to secure compensation to employees injured in their service. However, no appropriation was made by the Legislature providing funds for the payment of compensation to employees of the State who might be injured or to dependents of workmen who might be killed in the course of their employment and thus be entitled to the protection afforded by the act. As a matter of fact, many accidents have occurred to employees of the State, claims for compensation have been presented to the Industrial Commission, and awards of compensation have been made in these cases. But the awards could not be paid for the reason that no funds were available. It therefore becomes imperative that the Legislature shall appropriate immediately a sufficient amount to pay claimants in cases in which awards have already been made and to provide funds and machinery for the payment of claims which are certain to arise in the future.

At my request the State Industrial Commission is preparing a statement which will give approximately the cost of insuring compensation both to those employees of the State covered by the compulsory provisions of the law and to all the employees of the State, should the Legislature elect to bring the so-called non-hazardous occupations within the provisions of the act. My judgment is that the State should in this respect, as in all others, be a model employer of labor and that it should elect to pay compensation to injured employees and to the dependents of employees who have been killed, even though the employments in which they are engaged do not come under the classification of hazardous occupations enumerated in the act. If this is done, the Legislature should provide for securing compensation through the medium of the State Insurance Fund or should create a separate fund out of which the State may pay directly to the beneficiaries of the law any compensation to which such beneficiaries may be legally entitled.

Your attention is called to the fact that unless the State shall elect to bring under the provisions of the compensation act all of its employees without regard to the character of their occupations,

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those engaged in many branches of State employment which are extremely hazardous, not being enumerated in the groups covered by the compulsory provisions of the act, will not be protected by the law; as, for example, guards and keepers in our penal and reformatory institutions, guards and nurses in our asylums and hospitals for the insane, men engaged in forest preservation work and in the prevention and fighting of forest fires.

HEALTH OFFICE OF THE PORT OF NEW YORK

In my annual message last year I recommended the transfer of the Health Office of the Port of New York to the Federal Government. The Commission authorized by law passed last year, in accordance with my recommendation, has conducted negotiations with the Federal Government and it now appears that the transfer can be consummated on July 1, 1917. I am therefore recommending in the tentative appropriation act accompanying this message, that the necessary funds be provided for the work of the Health Office of the Port of New York up to July 1, 1917.

CITY SCHOOLS

It appears that there are nearly 300 special acts extending over a period from 1829 to date, relating to the organization and administration of the school systems in the several cities of the State. Many of these laws are antiquated and nearly all of them contain so many restrictive features that they obstruct and interfere with progressive school administration, instead of facilitating the transaction of the business affairs of the schools. Boards of education from various cities are constantly appealing to your honorable body for special legislation which will enable them to do certain things in connection with the schools which they should possess the power to do without coming to the Legislature to obtain the legal authority to perform such acts. It is recommended therefore that one simple, clear, comprehensive statute, repealing these special laws, be enacted applicable to all cities, which shall confer broad powers upon city boards of education and which shall give such boards freedom and independence com-

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mensurate with their responsibilities. Only the essential features of a school organization should be written in a statute, but sufficient power should be conferred upon the board of education of each city to enable that body to organize and administer the schools under its management in accordance with the needs and wishes of the people of the city which such board represents.

ADULT ILLITERACY

During the period 1900–1910, the percentage of child illiteracy in the State was reduced by 45 per cent, but so great was the immigration of illiterate adults during that same period that the total average percentage of illiteracy was not diminished, though in all other States, except one, there was a reduction in this percentage. There are at present more than 360,000 illiterates in the State over fifteen years of age. These figures indicate that if illiteracy is to be eliminated in the State some State-wide provision must be made to reach the adult immigrant through educational facilities beyond those offered through the public day school. The larger cities are already making some provision, but the State as a whole should now seriously, vigorously and specifically undertake to reduce adult illiteracy as it has with such success attacked and reduced child illiteracy. Every argument for training a child into a knowledge of the language of America and of the obligations of citizenship is equally potent for the alien who comes after the school-age, but who wishes to become a worthy American citizen. I ask the serious attention of the Legislature to the matter in order that steps may be taken to reduce illiteracy to the very minimum in this State before the end of the decade.

CHARLES S. WHITMAN

ALBANY, *January 3, 1917*

Transmitted to the Legislature February 1, 1917

FRAWLEY BOXING LAW

Transmitted to the Legislature February 1, 1917

I desire to urge upon your Honorable Bodies the immediate repeal of chapter 779 of the Laws of 1911, commonly known as the Frawley Boxing Law.

I am satisfied that this law was carefully framed, was passed by the Legislature and approved by the Governor after mature deliberation and consideration; that no better statute can be devised which will permit the giving of boxing bouts as public exhibitions to which an admission fee is asked and received. It was clearly the purpose of the law-makers of the State to permit and, perhaps, encourage, decent and wholesome boxing contests and it was apparently hoped that under the control of a proper Commission this could be accomplished.

I am satisfied, and I believe the members of your Honorable Bodies who are familiar with the events of the last few years have also become satisfied, that however good the intentions of our law-makers and the members of the Commission may be, the condition is such that public exhibitions of this kind cannot be held within proper limits under this statute, or under any statute which permits fighting or boxing in the presence of miscellaneous audiences which have gained admission thereto by the purchase of tickets.

I am informed and from my own knowledge of the law I believe that some of the exhibitions against which many of the good citizens of this State have properly protested on the ground that they are vulgar, indecent and brutalizing, are not in violation of the law or of the rules perhaps correctly adopted by the Commission under the provisions of the statute.

In the interests of public morals, I deem it my duty to respectfully call the attention of the Legislature to this subject, and to ask for the repeal of this statute.

(Signed) CHARLES S. WHITMAN.

Transmitted to the Legislature February 6, 1917

NECESSITY FOR APPROPRIATING \$1,000,000 FOR PREPAREDNESS

Transmitted to the Legislature February 6, 1917

Diplomatic relations between the United States and the German Empire have been severed. The President has given notice that if American ships and American lives should be sacrificed in the prosecution of the naval program which the German government has announced as its intention to adopt, the President would ask the Congress that authority be given him to use any means that may be necessary "for the protection of our seamen and our people in the prosecution of their peaceful and legitimate errands on the high seas."

The State of New York should be adequately prepared to support the Federal Government in any emergency which may arise.

There has been introduced a bill appropriating the sum of \$1,000,000 to be made immediately available for such purposes as may be found necessary in connection with the organization of the military and naval forces and resources of the State.

Therefore, in accordance with the provisions of section 15 of article 3 of the Constitution, and by virtue of the authority thereby conferred upon me, I do hereby certify to the necessity of the immediate passage of Senate Bill Introductory No. 350, Printed No. 349, entitled:

"An Act making an appropriation for the expenses of national guard, naval militia, volunteer and other organizations called into service on the orders, request or requisition of the president of the United States or of the governor of the state of New York and for other purposes in preparation therefor."

Given under my hand and the Privy Seal of the State
at the Capitol in the city of Albany, this sixth day

[L. s.] of February in the year of our Lord, one thousand nine hundred and seventeen.

(Signed) CHARLES S. WHITMAN.

By the Governor:

W. A. ORR,

Secretary to the Governor.

INTRODUCTORY STATEMENT

The State Department Reports have been made the official publication for the opinions of the State Court of Claims and hereafter all the opinions of this Court, and not simply a selection therefrom, will be promptly published in these Reports.

The question of publishing these opinions in the Miscellaneous Reports was given careful consideration, but because of the impossibility of publishing in that series of reports all of the opinions of the Court of Claims, it was finally decided to publish them in the State Department Reports owing to the advantage of having in one publication all the opinions of the Court, thus avoiding the necessity of looking in two places for them. This decision was also influenced in part by the fact that the State itself is the defendant in all the actions brought in the Court of Claims and the opinions of this Court are therefore of peculiar importance to the State and to the various State Departments.

The consideration given to this matter accounts for the delay in publishing the following opinions.

COURT OF CLAIMS

THE ADIRONDACK WOOLEN COMPANY v. STATE OF NEW YORK
No. 9748

(Dated February 7, 1916)

At what time title vests in the State where lands are appropriated for canal purposes.

The claimant owns premises at Little Falls, between the Mohawk river and the old Erie canal; it also owns a right of way across what is known as Seeley island to William street, in Little Falls, and a bridge between Seeley island and the mainland spanning the Mohawk river. In 1908 the State appropriated a portion of claimant's premises so as to allow the State to widen the Erie canal for Barge canal purposes. The claimant asks for compensation for the value of rock appropriated, and also for an additional sum estimated at from \$88,225 to \$95,500. It also alleges that its woolen mill property, situated on the island where plaintiff's property was located, had not been appropriated, but the State had taken over the factory right of way to William street, Little Falls, and that this isolated the woolen mill property.

After these appropriations had been made, the State, before any award was made, modified its appropriation of land, and reserved to the claimant a right of way between its woolen mill property and the bridge at William street, so as to decrease the cost to the State. This modification of land appropriations raises the question of the power of the State to reduce or modify an appropriation before judgment entry or actual payment of compensation. The uniform holding, however, of the courts is that title in this State does not vest until the money has been paid or the appraisal has been made and recorded or the Statute of Limitations has run. *Held*, that, under the facts shown, the appropriation made by the State on or about December 9, 1913, herein, under maps specified, are valid appropriations, and that further proof should be submitted to enable the court to determine the compensation to which claimant is entitled under these and former appropriations.

CLAIM against the State of New York for damages to lands caused by the appropriation of the same by the State for Barge canal purposes.

Subsequent to the submission of this case before the former Court of Claims a further appropriation was made by the State reserving in the claimant a certain right of way and the ques-

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tion is presented as to the validity of the action of the State in thus reducing the appropriation and as to the necessity for further proof thereunder.

The claimant's premises consist of what is known as Moss island at Little Falls, lying between the Mohawk river on the north and the old Erie canal on the south.

West of Moss island, so called, lies Seeley island, from which there is a bridge spanning the Mohawk river to the mainland.

Prior to the appropriation the claimant had access to its property by means of the towpath extending east and west therefrom which it is claimed occupied the site of an old highway.

Two months prior to the original appropriations by the State the claimant acquired a right of way across Seeley island to William street and the bridge above referred to.

A part of the premises of claimant consists of a large quantity of hard rock and three months prior to the appropriation it entered into a contract with certain parties for quarrying the same under which it was to receive a certain price per cubic yard for all stone quarried out and taken away.

It was estimated that there were within the terms of the contract 608,328 cubic yards of rock measured down to the canal level and 960,167 cubic yards of rock taken at the level of the Mohawk river. The total value of this rock was estimated by witnesses for the claimant at from \$208,250 to \$300,000 while the quarry contract itself was estimated to be damaged from \$60,000 to \$87,700.

Under this situation the State on October 27, 1908, appropriated a part of the premises of the claimant including a strip of the rock formation sufficient to enable the State to widen the Erie canal for the purposes of the Barge canal.

The appropriation did not take the claimant's woolen mill property, situated upon the island, but appropriated in addition to the rock above referred to, land over which the claimant had obtained the right of way to William street. The appropriations it is claimed isolated the woolen mill property.

These appropriations were not signed by the State Engineer, who under the statute is authorized subject to certain conditions to enter upon, take possession of and use property for the improved

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canals, but by the Deputy State Engineer, and it is claimed that the appropriations are for that reason void. This contention of the State, however, has been held to be unfounded by the predecessor of the present court, the Board of Claims, and it is not now before this court for determination.

Under these appropriations the claimant insists that aside from the compensation to which it is entitled for the appropriation of rock, it is entitled to a further sum ranging, according to the testimony of its witnesses, from \$88,225 to \$95,500.

The alleged value of the right of way to the claimant may be gathered from the testimony of the witnesses who said that its mill property before the appropriation was worth from \$100,225 to \$108,000 and that afterwards this property was worth but from \$12,000 to \$12,500.

This testimony emphasized the increased expense to the State resulting from the alleged cutting off of the right of way and suggested to the State officials that the appropriations should be modified by reserving to the claimant a right of way over the property appropriated by the State.

It is claimed that the State Engineer and Canal Board are limited in their appropriations by the necessities of the State, that they cannot appropriate more land than the State requires, and that if they appropriated a right of way estimated to be worth many thousands of dollars which is wholly unnecessary it is an excess of authority.

In this situation and before any award was made under the original appropriations the State made new appropriations and thereby reserved to the claimant a right of way from the remaining portion of its property over the land appropriated to and over the existing road from William street to Barge canal lock number seventeen.

These appropriations were designed to provide an outlet for the woolen mill property which had been isolated and thereby reduce the amount of compensation which the State would otherwise be obliged to pay under the original appropriations.

The new appropriations are questioned by the claimant on the ground of the authority of the State to modify the original

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appropriations by reducing the amount of land or rights taken thereunder.

The question is, can the State before an award is made or paid to a claimant or agreed upon by the Canal Board decrease its appropriation and thereby relieve itself from damages which it otherwise would be obliged to pay?

Nottingham & Nottingham, for claimant.

Egburt E. Woodbury, Attorney-General (Sanford W. Smith, Deputy Attorney-General), for State.

RODENBECK, P. J.—The question as to the power of the State to reduce an appropriation at any time before a judgment has been entered or the compensation has actually been paid is an exceedingly important one to the State and being merely one of statutory construction should be answered favorably to the State unless by express language of the statutes or by a fair implication therefrom title to land appropriated vests at some earlier period.

In this opinion the court is voicing its sentiments as to what the law upon this subject ought to be and is basing its views chiefly upon the consideration that this statute does not expressly prescribe when the title shall vest. The court of course realizes that there is an opportunity for a difference of opinion but feels that with such an opportunity presented the attitude of the court should be favorable to the view that the appropriation may be reduced until a judgment has been entered for the compensation which has been appraised or until the money has been paid especially since the statute is silent upon the subject as to when the title shall vest in appropriation cases.

The statutes preceding the Barge canal statute and the decisions made thereunder are uniform in holding that the title did not vest when the State entered upon the land and thereby appropriated it but rather when the award had been made and recorded or the Statute of Limitations had run against the owners of the property. And this unbroken record of statutory enact-

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ment and judicial decisions should have great weight in interpreting the Barge canal statute upon the subject under discussion in view of the omission from that statute of any express language prescribing when the title shall vest in the State.

The language of the early statutes under which the canals of the State were constructed was not always clear and has not been uniform upon the question of the interest which the State acquires and when the property appropriated became the property of the State but the decisions themselves have been uniform in holding that the title did not vest until the money had been paid or the appraisal had been made and recorded or the Statute of Limitations had run.

Under the early statutes there was little formality connected with appropriations. The proper officer merely took possession leaving the owner to his recourse for the appointment of appraisers by application to the courts. There was also a short Statute of Limitations of one year which ran against him if he did not take steps to have his property appraised. This was not an unusual procedure for at that time the construction of the inland waterways of the State was a new project and it was believed that it would add wonderfully to the value of property through which it was constructed and to the resources of the State. With this idea in mind the statute of 1816 (chap. 237) proceeded upon the assumption that the people who owned the property that was required for the canals would voluntarily make such grants as were necessary. But this was found to be an erroneous assumption and by the statute of 1817 (chap. 262) provision was made for the appropriation of the necessary land *in invitum*. It was under the latter statute and subsequent statutes that it was provided that the State might enter upon and take possession of such property as was necessary and relegate the owner to recourse to the courts for the appointment of appraisers vesting title in the State within a year after the appropriation if an appraisal was not applied for and made. It was provided in the latter statute that if the claim was not prosecuted within the time prescribed the owner should lose all interest in the property but that if such an application was made "the canal commissioners shall pay the

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damages so to be assessed and appraised, and the fee simple of the premises, so appropriated, shall be vested in the people of this state." § 3.

From these earlier statutes it will be observed that no maps were required to be made as a preliminary to an appropriation but that the mere occupancy and possession by the State constituted the appropriation and gave the State full control over the property vesting the title in it after the lapse of a year if no appraisal was made and if an appraisal was had when the damages shall have been assessed and appraised. The latter conclusion is based upon the force to be given to the words "so appropriated" contained in the provision above quoted from the statute of 1817, which provides that the fee simple shall be vested in the people of the premises "so appropriated," referring to the requirement that the commissioners shall pay the damages "so to be assessed and appraised."

It is obvious that with such a procedure the exact amount of land which the State had appropriated might be seriously in doubt in those cases where there had been no appraisal and so the State later provided that maps should be made of the canals of the State and that when these maps had been made as required by the statute the lands inclosed by the lines on the maps as indicating the property of the State should create a presumption of ownership in the State. These maps are usually referred to as the Holmes-Hutchinson maps of 1834 and are the main reliance of the State in establishing its ownership to much of the canal lands of the State. Subsequent general maps were made, known usually as the canal maps of 1874, but they do not seem to have complied with the requirements of the statute with reference to authentication so as to give them the force as evidence which attaches to the maps of 1834.

The provisions of these statutes of 1816 and 1817 and any amendments thereto were carried into the Revised Statutes which like previous statutes provided for an appraisement of the property at the option of the property owners, such appraisement to be made by commissioners to be appointed upon application to the courts. The same informality with reference to the manner

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of making appropriation was continued and no further requirement was inserted with reference to the making of maps of specific property appropriated. The short Statute of Limitations was also continued. Under the Revised Statutes it will be seen that the theory was that the appropriation consisted in entering upon the property leaving the property owner to seek compensation by application to the courts for an appraisement. If there is any doubt with respect to the meaning of the language in prior statutes with reference to the vesting of title it is cleared by the language of the Revised Statutes which provides that "the fee simple of all premises so appropriated, in relation to which, such estimate and appraisement shall have been made and recorded, shall be vested in the people of this state." R. S. 1829, pt. I, chap. 9, tit. 9, art. 3, § 52. This language is very plain that the fee simple does not attach until the estimate and appraisement has been "made and recorded" and this is the construction which the courts have placed upon the language. *Brinkerhoff v. Wemple* (1828), 1 Wend. 470; *Baker v. Johnson* (1842), 2 Hill, 342; *Rexford v. Knight* (1854), 11 N. Y. 308; *Ballou v. Ballou* (1879), 78 id. 325.

The views of the courts upon the statutes heretofore referred to are clearly expressed in the following quotations from the *Rexford* and *Ballou* cases:

"The construction of those acts (1817 and 1819) has been, that the fee did not vest in the state, until the payment of the compensation, although the authority to enter upon and appropriate the land was complete prior to payment." *Rexford v. Knight*, 11 N. Y. 314.

"The owner of land has a right to prefer a claim for damages as soon as the land is taken possession of by the state, but the title does not vest in the state until the amount of damages becomes fixed by appraisement. When the damages are thus ascertained the title passes, the presumption being that the state will pay the amount upon demand. The statute settles the point. It provides that 'the fee simple of all premises so appropriated in relation to which such estimate and appraisements, shall have

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been made, and recorded, shall be vested in the people of this state.' ” Ballou v. Ballou, 78 N. Y. 327.

The uncertainty and unfairness of appropriating property by merely taking possession without a notice of the extent of the appropriation began to be felt and the courts postponed the operation of the short Statute of Limitations where the exact boundaries of the property appropriated were not known and finally the State added to the formalities necessary to make a valid appropriation by providing that a notice should be served upon the owners or occupant containing a description of the property taken. Laws of 1884, chap. 336. This and similar statutes along this line have no significance upon the question under consideration except to emphasize what will be later contended that the mere requirement as to the making and filing of a map and the giving of notice was intended solely to give definiteness to the appropriation and not to prescribe the time when title shall vest in the State. The fact that a map is to be made and filed or that it is to be served upon the owner of the property or filed does not because of its formality change the general rule as to vesting of title.

The last of these general statutes relating to the construction of the canals is the Canal Law of 1894 subsequently re-enacted which revised in one statute the various provisions relating to the canals of the State. Following the trend of the statutes with respect to greater formality with reference to appropriations the Canal Law provided in addition to taking possession and making maps that a notice should be served upon the property owner that his land had been appropriated but it did not change the rule which had prevailed theretofore as to the vesting of title. The additional requirement that a notice should be served on the property owner did not alter the rule as to change of title from the owner to the State any more than did the requirement in prior statutes that a map should be made and filed of the appropriated land. On the contrary the Canal Law provided that “The title to all real property permanently appropriated for the use of the canals of the state shall be

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vested in the people of this state" (§ 83), but it did not in express language indicate when the title should vest, leaving the courts to follow the rule previously enunciated that the title would not vest until the compensation had been appraised and recorded which might, under later statutes, be said to be when the judgment had been entered.

But we are concerned here with the provisions of the Barge Canal Act, a special statute applicable only to the Barge canal and designed for the construction of that improvement. Where its provisions are complete they would undoubtedly supersede the provisions of any other statute upon the same subject. The provisions in the Barge Canal Act are complete so far as the manner of making appropriations for Barge canal purposes are concerned and, therefore, it is a fair conclusion that in determining the question which we now have before us we must have recourse to the provisions of the Barge Canal Act rather than to those of the Canal Law and the decisions which may have been made under the latter statute.

Looking at the Barge canal statute it will be seen that its provisions are a substantial continuation of existing provisions relating to appropriations as those provisions are contained in the Canal Law. They have been modified it is true, but like prior statutes the Barge Canal Act is but a step in the development of legislation on the subject of appropriations and there is nothing in the act which indicates an intention on the part of the State to change the rule which had previously existed for over three-quarters of a century that the title to the property appropriated should not vest in the State until an appraisal had been made and recorded or the Statute of Limitations had run. There are no decisions directly in point, however, for there appears to be no case construing the Barge canal provisions so far as the time of vesting of title in the State is concerned.

Under the provisions of the Barge canal statute as originally enacted the State Engineer and Surveyor was authorized to enter upon and take possession of property and thereafter maps were to be made and filed and notices were to be served upon the property owners. Under the statute as originally enacted it is quite

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likely that the right of possession of the State was complete when the State Engineer and Surveyor entered upon and took possession of the property and that the subsequent requirements were merely designed to give the owner a notice of the amount of the property which had been appropriated by the act of the State Engineer and Surveyor. The statute as first drawn followed closely, it will be seen, the language of previous statutes which regarded the act of the State in entering upon the property and taking possession of it as an appropriation of the property.

Experience, however, taught the State the necessity of restricting the powers of the State Engineer and Surveyor and in order to avoid an abuse of the discretion vested in him with reference to taking possession of property an amendment of the original statute provided that this right should be restricted and there was inserted the limitation that he should have the right to enter upon and take possession of property subject to certain conditions, which conditions were that the appropriation should be approved by the Canal Board in addition to the further and previously existing requirements that a map should be made and notice should be given to the property owner.

The unlimited power of the State Engineer and Surveyor to enter upon and take possession of property was thereby restricted, but it was not the design of this statute by its original language or by the additional precautions inserted by the amendment requiring greater formalities with respect to appropriations that they should when completed necessarily vest the title in the State. The rule with respect to the vesting of title had not been changed by increasing the formalities with respect to the procedure for appropriating property.

It is true that the statute provides that from the time of the service of the notice the entry upon and appropriation by the State shall be deemed complete and that the notice shall be conclusive evidence of the entry and appropriation but this language offers nothing new with respect to the time when the title vests in the State. So many formalities were required with respect to the appropriations that it was deemed necessary to provide at what time the appropriation should be complete and

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so the statute prescribed that that event shall take place when the notice is served rather than at any prior stage of the acts of appropriation.

There are many authorities illustrating the conclusion that the term "appropriation" is not necessarily used as signifying the time when the title passes. *Kennedy v. Indianapolis*, 103 U. S. 599; *Matter of Mayor*, 40 App. Div. 281; 15 Cyc. 720, 758. There is, therefore, no express language in the Barge Canal Act which prescribes when the title shall vest in the State and there is nothing in the Canal Law, if that statute applies, which lends any assistance in determining the question. Nothing is to be inferred from the greater formalities required in making appropriations under the Barge canal statute and the word "complete" should not be extended beyond what it was intended to signify, that is, when the act of appropriation was complete.

In view of the use of this term and the restrictions by the amendment to the Barge canal statute of the power of the State Engineer and Surveyor to enter upon and take possession of property it may well be that the right to actually occupy property dates from the service of the notice of appropriation in which case interest runs from that date upon any award made or compensation allowed to the property owner.

This view that the title does not pass by the mere act of appropriation as a general proposition is well expressed in *Commissioners of Washington Park*, 56 N. Y. 144, which reviews the English and American cases on this subject and holds that the taking of the preliminary steps in condemnation proceedings, such as a vote of the park commissioners to take certain land, the filing of maps thereof or the appointment of commissioners of appraisal does not operate to pass the title but that the title vests only on the confirmation of the appraiser's report and the payment or deposit of the compensation.

Nor is there any thing in *People v. Adirondack Railway Company*, 160 N. Y. 225, at variance with the views expressed since in the statute there under review in addition to what is contained in the Barge canal statute there is the language which provides

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that from the time of the appropriation "such property shall be deemed and be the property of the state." This is very significant language and were it contained in the Barge canal statute it would compel a holding that the service of the notice of appropriation not only completed the appropriation but made the land thus appropriated the property of the State and vested the title in the State.

In view of the history of legislation upon the subject of appropriations by the State, as we have thus far outlined it, and especially in view of the failure of the Barge canal statute to prescribe in express language when title shall vest in the State, it seems reasonable and controlling that the general rule which has been formulated by the courts during nearly a century of the State's history covering the period of the construction of the canals of the State should be followed.

As we have seen above, under the statutes preceding the Barge Canal Act, title did not vest in the State until an appraisal had been made and recorded. We have also seen that under other statutes, where there was an absence of express language, the courts have held that a property owner was entitled to a definite judgment as to his compensation and an opportunity for the enforcement of the judgment before the title to the property would pass out of him. In the absence of express language in the Barge Canal Act, requiring a different holding, these rules, which may be said to be general principles underlying the condemnation of property in this State, should be the guide for interpreting the statute under consideration.

The Legislature, of course, may provide for the passing of title in advance of payment if adequate provision is made for such payment and a proper tribunal afforded for determining the compensation; but the general rule is that title does not pass until payment or tender, or until the Statute of Limitations has run. 15 Cyc. 577, 578, 785; *Benedict v. City of New York*, 98 Fed. Rep. 789; *People v. Adirondack Railway Co.*, 160 N. Y. 225; *People v. Tompkins*, 40 Hun, 228; *Sweet v. Rechel*, 159 U. S. 380; *Simmerman v. Kansas City N. W. Railway Co.*, 144 Fed. Rep. 622; *Cherokee Nation v. Kansas Railway Co.*, 135 U. S.

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641; *B. & S. R. R. Co. v. Nesbit*, 10 How. (U. S.) 395; *Kennedy v. Indianapolis*, 103 U. S. 599.

In the last case cited which involved a statute providing for the building of a canal by the State, which statute was quite similar to our canal statutes, the court said: "It seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him." Page 603.

In 15 Cyc. 785, 786, it is said: "Under constitutions which contain no express requirement that payment shall precede taking but prohibit the taking of private property for public use without just compensation, title does not pass before payment, except where the statute expressly provides that title shall pass before compensation and makes adequate and certain provision for such compensation."

In *People v. Adirondack Railway Co.*, 25 Misc. Rep. 88, the court said: "Under the condemnation proceedings taken by the railway company the title of the land sought to be taken does not pass upon the procuring of a judgment of condemnation, nor does it pass until the amount of compensation has been determined and actually paid the owners. Code Civ. Pro. §§ 3371, 3373."

In construing statutes it is the rule, where there is an opportunity for a difference of opinion as to the proper construction, to adopt that construction, other things being equal, which carries out some general public policy or serves some public interest. Following this rule, it seems a salutary one in the light of what has been said to adopt the construction that title does not vest in the State until an appraisement has been made and recorded or paid, that is, until a judgment has been entered in the Court of Claims, or paid, or until the Statute of Limitations has run, or an agreement has been made with the proper officials.

One of the main advantages to be derived from such a con-

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struction is, that it will enable the State to reduce an appropriation before the judgment has been entered or the money paid, where a mistake has been made in describing the appropriation or an excess appropriation has been made which is useless for the purposes of the canal. Under the construction that the title vests when the appropriation is served even a technical error, which may affect the amount of property taken, cannot be corrected, and certainly an excess appropriation of land or water rights cannot be reduced. There are many cases where excess appropriations have been made and where the State, unless the construction here contended for prevails, will be obliged to pay for property for which it has no use. In some instances appropriations have been made of land without realizing that they carried with them riparian rights attached to the land, and under the construction that the title vests when the notice is served the State cannot divest itself of these excess riparian rights. Likewise where appropriations of land have been made and property has been isolated, due to failure to reserve a right of way over the appropriated land, the State is helpless, unless the contention here made is sustained, and cannot change the appropriation by legally reserving in the owner a right of way over the appropriated land to the isolated land. These instances, briefly recited as they have been, would make a most decisive impression if the enormous amounts involved could be stated and the damages due to isolating land, which the State has no use for, could be enumerated. It may be seriously questioned whether the recent bond issue provided for the completion of the Barge canal will be sufficient for that purpose unless the State is permitted to relieve itself so far as possible of excess appropriations which are not needed for the canals and which cannot be used for purposes of public income.

The position here urged is designed to place the State in the same position with respect to the discontinuance of proceedings or the reduction of appropriations that is common to public service corporations and municipalities of the State. The General Condemnation Law provides that proceedings taken under that act may be abandoned at any time within thirty days after the

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entry of the final order and that there may be a renewal of the proceedings upon terms. Code Civ. Pro. § 3374. The charter of Greater New York permits that city to fix the time when the fee shall attach. § 1439. And the general rule is, that condemnation proceedings may be discontinued at any time before title passes. *Benedict v. City of New York*, 98 Fed. Rep. 789; *Commissioners of Washington Park*, 56 N. Y. 144; *B. & S. R. R. Co. v. Nesbit*, 10 How. (U. S.) 395. Such being what might be called the general policy of the State founded upon sound reason and public interest, why should a different rule be applied to the State binding it with an iron band to appropriations described in the notice of appropriation, in the absence of any language that by that act the property changes hands and becomes vested in the State.

But an additional reason in support of the conclusion arrived at is found in the fact that this result will not injure persons to the slightest extent whose property has been appropriated. They are guaranteed just compensation by the Constitution, and whatever the acts of the State, whether they be temporary or permanent in their character, a remedy exists in favor of those who have been injured. If the State has occupied property under a permanent appropriation for which a notice has been served and subsequently releases a part of that property, the owner is clearly entitled to such damages as he sustained during the occupancy. Where the appropriation has been changed, the owner would be entitled to compensation as to a permanent appropriation for the property described in the final appropriation and for such damages as he sustained by reason of the earlier appropriation. Such being the case, it would seem that property owners should assist rather than oppose construction which the State seeks to place upon the Barge canal statute authorizing it to reduce appropriations subsequent to the service of the notice of appropriation and before judgment has been entered or the compensation paid or the Statute of Limitations has run.

The provisions of chapter 244 of the Laws of 1909 do not militate against the view that the State may reduce an appropriation before the compensation is awarded or paid. Some statute was

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necessary in order to confer authority upon State officers to execute a reconveyance after an appropriation had been made, an award determined, the compensation paid and the fee vested. There is nothing in the statute which indicates an intention on the part of the Legislature that the State may not change its appropriation at any time before the transaction has been completed by the making of an award or the payment of the compensation.

The court, therefore, holds that the appropriation made by the State on or about December 9, 1913, under maps Nos. 928-c, 953-a and 954-b are valid appropriations and that further proof should be submitted to enable the court to determine the compensation to which claimant is entitled under these and the former appropriations.

It seems appropriate at this time to indicate to claimant the attitude of the court with respect to the claims made by the parties with whom it has made a contract for quarrying stone from its property. This court has jurisdiction to hear and determine claims against the State only. It has no authority to determine disputes between individuals for which regular courts have been provided. Except in extraordinary cases where the amounts involved are small, this court is unwilling to exceed its authority even where all the parties consent thereto. In this claim the court will not make a separate award to those parties having the quarrying contract but will make one award and leave it to the parties to adjust the award between them according to their respective rights.

In view of the delay that has occurred in connection with the disposition of this claim the court will grant a preference in the submission of further proof and permit claimant at any time and at any term to present such further proofs as may be necessary to put the claim in a condition for final award.

Ackerson, Fennell and Paris, JJ., concur.

Ordered accordingly.

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FRANK DEBOTTIS *v.* STATE OF NEW YORK

No. 10564

(Dated February 8, 1916)

Damages for personal injury sustained by falling from a canal bridge where there was no guard rail.

Claimant alleges that while crossing a highway bridge over the canal he stubbed his toe against one of the bridge planks, lost his balance and fell from the bridge to the canal towpath at a point where there was no guard rail along the side of the bridge. The contention of the State is that claimant was not on the bridge when he sustained his injuries.

CLAIM against the State of New York for damages for personal injuries.

Thompson, Woods & Woods, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General) for State.

FENNELL, J.— This accident happened February 1, 1911, at about 7:30 P. M. at a canal bridge near Port Byron.

Claimant contends that he was passing northerly across the highway bridge over the canal when he stubbed his toe against a piece of plank laid lengthwise of the bridge and on top of and across the ends of the regular roadway planks of the bridge; that when he stubbed his toe he pitched forward and to the left; that before he could recover his balance he fell over the edge of the bridge to the canal towpath; that there was no guard rail along the side of the bridge where the claimant fell and that the State should have provided such a guard rail.

The State contends that claimant left the bridge and started down the stone steps leading to the towpath which steps were

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formed by the ends of the courses of stone that form the abutment of the bridge.

The fall caused a compound comminuted fracture of the right leg below the knee. Subsequent infection caused ankylosed condition of the knee joint. The bones below the knee are badly out of place. The front and side of the leg below the knee have very large and very ugly scars. Claimant is undoubtedly a cripple for life. His condition is peculiarly distressing in that he is a market gardener engaged in raising garden truck, which his sons take to market, and the ankylosed knee makes it impossible for him to kneel down and weed, cultivate and care for the young seedlings and plants. He is sixty years of age.

There are two serious questions in this case. How did claimant fall? Is his present very serious condition due to the injuries sustained in the fall and their natural consequences or to his failure to take proper care of himself after the injury?

The evidence on the cause of the fall is in direct conflict. It cannot be harmonized in any way. Edward Haley, then and now a State employee, testified that he went to the home of the claimant after the accident and took claimant in an auto to the scene of the accident; that claimant showed him where he fell; that the spot was four or five steps down from the top of the stone steps. Alonzo Beach, now a State employee, testified that he drove Haley to claimant's house in an auto; that he heard claimant say he fell going down the bridge steps; that he drove Haley and claimant to the bridge and claimant pointed out the place where he fell; that the place was three or four or maybe the next step down; that he stated he tripped there and fell.

A natural sympathy for one so seriously crippled warrants an extra careful scrutiny of the State's evidence. If these two men were bridge tenders and the accident happened because of their alleged carelessness or negligence then their evidence, given to protect themselves and their positions, might well be seriously questioned. Here there was no such condition. They had nothing to do with this bridge and were not responsible for it or the use of it.

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Claimant marked with an "X" on a photograph the spot on the bridge where he stated he stubbed his toe. It was just where the end truss enters the floor of the bridge. Carl T. Holsteiner, a civil engineer, testified that the north end of the truss entered the bridge floor one and seven-tenths feet from the wall of the abutment. Claimant was walking toward the abutment when he stubbed his toe. Claimant states he struck about one foot from the water's edge of the canal and crawled to the foot of the steps. The civil engineer's testimony shows that the water's edge is fourteen and six-tenths feet from the abutment. Claimant was found at the foot of the steps.

George Elliott was sworn for the claimant on his case in chief and testified to helping to pick up claimant and to the extent of his injuries as he saw them at the time. Elliott was also sworn in rebuttal and then stated that after taking Debottis away he went back with a lantern to the place of the accident and found a pool of blood under the line of the side of the bridge, six or seven feet from the face of the abutment and six or seven feet east from the third or fourth step. Claimant also swore on rebuttal that he could not tell where he landed on the towpath. The "X" mark, made by claimant on the photograph, shows he stubbed his toe while walking toward the abutment at a point one and seven-tenths feet from the abutment. If he fell at the point claimed the pool of blood should have been very close to the face of the abutment. If he fell where Elliott testified he saw the pool of blood then he must have fallen over the end truss composed of two parallel members, which rises at an angle of two and eight-tenths feet in seven feet.

Claimant was on his way home. To reach his home he could have gone directly ahead along the roadway, followed the bend of the road to the left and then some distance to a canal lock, whence he could come back up the towpath a short distance to his house. He could also get home by going down the stone steps at the side of the bridge and passing along the towpath to his house.

I am forced to the conclusion that claimant was walking down the stone steps when he tripped and fell.

Dr. Stuart, who attended claimant, testified that there was no

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chance to give aseptic dressing at the home of claimant and the result was abscesses, suppuration of upper and lower leg and general systematic poisoning. On cross-examination he testified that the infection was caused by claimant's habits of life and surroundings; that the ankylosed condition of the knee was due to the results following the infection which came largely through his surroundings; that he had recommended that claimant go to a hospital for treatment. Claimant stated that he did not have the money to go to a hospital. There are provisions made for surgical cases in hospitals even when patients are indigent. The ankylosed condition of the knee which resulted from claimant's failure to take the steps and precautions recommended by his attending physician should not be charged against the State of New York.

The physical condition of the claimant is pitiable and excites sympathy but there seems to be no negligence on the part of the State which caused his original injury.

Claim dismissed.

CITY OF NEW YORK v. STATE OF NEW YORK

No. 2473-A

(Dated February 14, 1916)

Claim for one-half of the excise moneys representing interest upon funds deposited in New York city bank by special deputy excise commissioner.

Under the Liquor Tax Law the special deputy commissioner is to deposit excise moneys in the city of New York in a bank or other depository in a separate account in his official name entitled "Liquor Tax Moneys." The intent of the statute is that a single account be kept in the bank until such moneys are divided as required in section 12, subdivision 17, of the Liquor Tax Law and the account thus kept is to be distributed within ten days from the receipt thereof. Until apportioned by the special deputy commissioner of excise, the interest on this account belongs to the State and thereafter shall belong to the city and the locality in equal shares. (Reversed by Appellate Division.)

CLAIM against the State of New York for certain interest on excise moneys deposited in New York city banks.

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Joseph A. Stover, Assistant Corporation Counsel, for claimant.

Egburt E. Woodbury, Attorney-General (James S. Y. Ivins, Deputy Attorney-General), for State.

RODENBECK, J.— This is a claim for \$6,025, being the amount of interest accumulated on liquor tax moneys deposited in banks in the city of New York by the special deputy commissioner of excise. By virtue of the fact that the city of New York is entitled to one-half of the excise moneys it claims also to be entitled to one-half of the interest which accumulated upon the funds deposited in the banks of the city by the special deputy excise commissioner.

This position of the city of New York is not tenable. The Liquor Tax Law provides that the special deputy commissioner shall deposit excise moneys in a bank or other depository in a separate account in his official name entitled "Liquor Tax Moneys." It was the intention of the statute that a single account in the bank should be kept until the moneys are divided. Liquor Tax Law, § 12, subd. 17. It further provides that one-half of the revenues resulting from taxes, fines and penalties under the provisions of the Liquor Tax Law shall be paid by the special deputy commissioner within ten days from the receipt thereof to the treasurer of the State of New York and the remaining one-half to the town or city in which the traffic was carried on from which the revenues were received. Id. § 10. The statute therefore provides for a single account and that the moneys in the account shall be distributed within ten days from the receipt thereof. The statute further provides that the interest accruing on this account until its apportionment by the special deputy commissioner of excise shall belong to the State and that any interest accumulating after its apportionment shall belong to the State and the locality in equal shares. Id. § 12, subd. 17. The statute uses the words "undivided" and "apportioned" with obvious distinction. The moneys in the bank may be undivided and unapportioned. They may be undivided and apportioned and they may be divided and apportioned. While the moneys of the State and the city are in a single account they are undivided. When the Excise Commis-

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sioner draws his check for the share to which the State and the city are entitled in this undivided fund, the fund is apportioned but still undivided and when the checks are presented and paid the fund is divided and apportioned. While the fund is undivided the State is entitled to the accumulated interest. After its apportionment by the Excise Commissioner and before payment each is entitled to one-half of the interest on the undivided fund, that is, there may be an accumulation of interest upon this undivided fund after its apportionment by the excise officer and this accrued interest on the undivided fund is to be equally distributed to the city and the State. *Id.* § 12, subd. 17. The power of the Legislature to make this distribution of accrued interest cannot be questioned any more than its authority to distribute one-half of the moneys to the city and one-half to the State. The cases which sustain the constitutionality of the distribution of the moneys are also an authority for the constitutionality of the distribution of the accrued interest. Where the Excise Commissioner does not distribute the money within ten days the city may compel him to do so but where it is not done the accrued interest until the fund is apportioned belongs to the State. The statute so provides. It says that "all interest accruing on undivided excise moneys deposited by any * * * special deputy commissioner of excise and all interest accruing on the part thereof apportioned to the state shall belong to the state of New York." *Id.* § 12, subd. 17. It is true that the statute says that "all interest moneys accruing on the part thereof belonging to the localities, etc.," shall belong to the city, but the word "belonging" evidently means apportioned. The scheme of the statute seems to be that while the moneys are unapportioned the State shall be entitled to the accrued interest on the undivided funds. The Excise Commissioner is not required to wait ten days before the distribution of the money but may distribute it at any time within the ten days or may deposit the moneys in separate accounts. Where the deposit is so made the State and the city are each entitled to the interest which accumulates on its account. In two instances the Excise Commissioner opened separate accounts and in these cases the State should remit the interest which was paid to it by the bank on the account

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opened in the name of the city. This interest amounts to the sum of \$280.68 for which the city of New York is entitled to an award with interest thereon from the date of its receipt by the State.

Fennell, J., concurs.

Findings may be submitted in accordance with this opinion.

FRED R. BUTTERFIELD v. STATE OF NEW YORK

No. 940-A

(Dated February 18, 1916)

"Appropriation of land," exact meaning of term and the limitations of class of cases to which it applies.

Service of notice of intention to begin action required by section 264 of the Code of Civil Procedure cannot be waived.

The claimant owns lands in the town of Kingsbury, county of Washington, and sought to recover against the State for the flooding of such lands, owing to the construction of a permanent improvement on Wood creek, along which the lands are located. Claimant, however, failed to file any notice of intention, as required by section 264 of the Code of Civil Procedure, and contends that no such notice was required, because the alleged damage was due to the permanent improvement made by the State in constructing a dam which interfered with the free flow of water in the creek and caused the flooding. *Held*, that the service of the required notice of intention is jurisdictional and cannot be waived, that the jurisdiction of the Court of Claims to hear any claim rests upon statute, and that, no compliance having been made with the statutory provision, the claim must be dismissed.

CLAIM against the State of New York for the flooding of claimant's land in the town of Kingsbury, Washington county.

W. E. Young, for claimant.

Egburt E. Woodbury, Attorney-General (Joseph P. Coughlin and Edmund H. Lewis, Deputies Attorney-General), for State.

RODENBECK, J.— This is a claim for the flooding of claimant's land in the town of Kingsbury, county of Washington, due, it is

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claimed, to certain defects in the construction of an improvement on Wood creek, upon which claimant's premises are situated.

The claimant did not file a notice of intention to commence an action as required by section 264 of the Code of Civil Procedure and the only answer thereto is that the statute does not apply because the flooding, it is claimed, was due to the permanent improvement made by the State some distance below the premises in the bed of Wood creek in the nature of the construction of a dam which it is alleged obstructed the free flow of the water of the creek and assisted in causing the flooding and damage.

The statute provides that "No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim." Code Civ. Pro. § 264.

It is obvious from this language that if it applies to the present claim the claim must be dismissed. The courts have repeatedly held that the filing of such notice is a condition precedent to the maintenance of an action and must not only be alleged but proved upon the trial. *Curry v. City of Buffalo*, 135 N. Y. 366; *Foley v. Mayor*, 1 App. Div. 586; *White v. Mayor*, 15 id. 440; *Misano v. Mayor*, 17 id. 536; *Sheehy v. City of New York*, 29 id. 263; *Krall v. City of New York*, 44 id. 259; *Smith v. City of New York*, 88 id. 606.

It is contended, however, that the words "appropriation of land" apply to a claim like the present one. This contention is

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erroneous. The word "appropriation" has a varying meaning but it cannot be interpreted to include a case of temporary or occasional flooding arising from an improvement constructed on a stream below the point of flooding. The exception of cases where the State has made an appropriation of land is due to the fact that the appropriation is the act of the State itself and it has full knowledge of the facts. The occasional indirect effects of such appropriation some distance away from the improvement can hardly be said to be within the knowledge of the State and to come within the language of the exception. The word "appropriation," however, has never been intended to include a case like the one under consideration. Webster defines it as "the act of setting apart or assigning to a particular use or person in exclusion of all others." The peculiar significance of the word is that of allotting, assigning or setting apart for some specific purpose; to make a thing one's own; to make it the subject of property; to exercise dominion over it for one's own purpose; the taking from another to one's self of a thing with or without violence. See Words & Phrases; *Filor v. U. S.*, 9 Wall. 45. There is no meaning attaching to the word "appropriation" which can be said to include the present claim.

The service of a notice of intention is jurisdictional and cannot be waived. It has a peculiar force in connection with a claim against the State. The jurisdiction of this court to hear any claim rests upon statute, and in this instance the statute says that no claim shall be "maintained" against the State unless such a notice has been filed. This language goes to the very right of the claimant to maintain the action and unless the notice is filed the court has no jurisdiction to entertain the claim, irrespective of any question as to whether the attention of the court was called to the failure to file a notice of intention.

This is not a technical objection to the maintenance of the claim. The purpose of the statute was to give the State, through the Attorney-General, timely notice of the proposed filing of the claim so that it might be investigated and so that he might require the person filing the claim to be sworn before him or one of his

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deputies designated by him for the purpose of investigating the facts relating to the claim. Unless the notice of intention is filed with the Attorney-General, that officer has no notice of the proposed filing of the claim and no opportunity is afforded him to investigate the claim and protect the State against unjust and baseless claims.

The claim should, therefore, be dismissed.

PARIS, J. (concurring).— This claim is for damages to crops of claimant, alleged to have been sustained by reason of the same having been flooded with water overflowing the banks of Wood creek, in the town of Kingsbury, Washington county, N. Y., claimant alleging that such overflow was caused by a dam built by the State of New York across Wood creek to a height above the natural flow of said creek.

Section 264 of the Code of Civil Procedure provides as follows: "No claim other than for the appropriation of land shall be maintained against the state, unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim. Willful false swearing before the attorney-general or deputy attorney-general is perjury and punishable as such."

No notice of intention to file this claim was filed either in the office of the clerk of the Board of Claims or with the Attorney-General, and no contention is made that the claim is founded upon the appropriation of land.

The contention of the claimant is, that the claim was filed

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within six months after the damages accrued, and that, therefore, no notice of the intention to file the claim was necessary.

My attention has not been called to any court decision under this section of the Code and I have been unable to find any, but this provision is analogous to the provisions of section 341 of the Village Law, under which decisions have been made. Under this section it has been held that the provisions of the section requiring a written and verified statement of the nature of the claim, etc., to be filed with the village clerk within sixty days after the cause of action has accrued, constitute a condition precedent, compliance with which must be pleaded and proven. See *Thrall v. Cuba Village*, 88 App. Div. 410.

The contention of the claimant that the filing of the claim within the period prescribed for the filing of notice of intention, takes the place of the notice of intention, seems to be met by the decision in *Cotriss v. Village of Medina*, 139 App. Div. 875.

If the claim is to take the place of the notice of intention, it would seem that it must be filed with the Attorney-General. There is nothing before this court in this matter to indicate that anything further was done than to file the claim under the rules with the clerk.

The claimant further contends that the State waived its rights under this section by not raising the point directly on the trial of the claim, and cites in support of his theory *McCarty v. Far Rockaway*, 3 App. Div. 379.

If the provision of the statute in question is jurisdictional, I do not believe it can be waived and jurisdiction conferred by the mere omission of the Attorney-General's office to make that objection on the trial. It seems to me that it is the duty of the claimant to show on the trial that everything necessary to confer jurisdiction had been done. In this case, before a decision had been made, the court's attention was called directly to the fact that no notice of intention had been filed as prescribed by law.

The court having actual knowledge that an act necessary to confer jurisdiction had been omitted, cannot go into the merits, but must dismiss the claim.

Claim dismissed.

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NED C. RYDER and HARRIET R. PHARIS v. STATE OF NEW YORK

No. 1223-A

(Dated February 25, 1916)

Damages for loss of use of agricultural land in 1912 by seepage from Erie canal.

Claimants seek to recover damages for the loss of the use of some thirty acres of agricultural land which became too wet for cultivation and pasturage because of water seeping in from the Erie canal and flooding said land.

CLAIM against State of New York for loss of use of some thirty acres of land caused by seepage from Erie canal.

Ray B. Smith, for claimants.

Egburt E. Woodbury, Attorney-General (Carey B. Davie, Deputy Attorney-General), for State.

PARIS, J.— This claim is for the loss of the use of about thirty acres of agricultural land during the season of 1912; the claim being that the said land was made too wet for cultivation and pasturage by reason of waters from the Erie canal seeping from said canal and flowing down upon said lands and covering them with water. The land in question was located in the town of DeWitt, county of Onondaga and State of New York.

From all the evidence in the case it is apparent that all of the land was low and swampy and had not been cultivated for years, but had grown up to brush, cat-tails and weeds. The claim seems to be based upon the theory it was the duty of the State to keep open the ditches on the said land. I find no foundation for such a claim in the testimony. There is little or no evidence of seepage from the canal during the year 1912. At any rate there is not enough of such evidence to warrant the conclusion that the damage claimed during the year 1912 was caused thereby. If water did seep from the canal onto the land that year, the land was in such

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a condition that it had practically little or no rental value for agricultural purposes that year. There is no allegation in the claim that a notice of intention to file a claim as provided by section 264 of the Code was duly filed and there was no proof of such filing made upon the trial.

The claim should therefore be dismissed.

JOHN WINN v. STATE OF NEW YORK

No. 1494-A

(Dated February 26, 1916)

Damages for destruction of crops and loss of use of land by flooding from Erie canal.

The claimant alleges that during the season of 1913 certain lands in the town of Sullivan, Madison county, were flooded by water seeping from the Erie canal, with the result of destroying the grass and hay crop and preventing cultivation. Claim was dismissed but the case is now up on appeal.

CLAIM against State of New York for loss of crops and of the use of land for cultivation during the season of 1913, by overflow from Erie canal.

Campbell & Woolsey, for claimant.

Egburt E. Woodbury, Attorney-General (F. B. Valentine, Deputy Attorney-General), for State.

PARIS, J.— This claim is for the destruction of crops of grass and hay and for the loss of the use of land for the purposes of cultivation on account of being too wet during the season of 1913; the claim being that the said land was made too wet for cultivation by reason of seepage from the Erie canal flowing down upon said lands and covering them with water. The land in question was located in the town of Sullivan, county of Madison.

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The principal reliance of the claimant is upon testimony to the effect that after the deepening and improving of the canal, when the water was not in the canal the lands were reasonably dry and that after the water was let in the canal the lands became wet.

This court held in the claim of Perkins v. State, 13 Court of Claims, 96, that "Negligence on the part of the State in the alleged flooding of land bordering upon a canal will not be inferred from the bare fact that before certain improvements were made on the canal the land was dry and that after the improvements the land was wet, it being necessary to show that the water which it is claimed caused the damage came from the canal and was due to the State's negligence."

The lands alleged to have been flooded in the Perkins claim were in the same town and county as the claim under consideration, and apparently in the immediate vicinity. Following the decision made in the Perkins claim this claim will have to be dismissed unless there is sufficient evidence of seepage from the canal flowing down upon this land to cause the damage claimed. The evidence as to such seepage during the year 1913 is very meagre. If full credence is given to all the evidence on the part of the claimant as to such seepage and the amount thereof, it does not seem reasonable that such seepage could have caused any considerable damage to the property in question. Apparently from the map in evidence and all the evidence in the case, the land in question is wet and marshy and unfit for cultivation, whether there is any seepage from the canal or not, and had been in such condition for years.

It is also contended in this case that at some prior time the State opened up ditches across this land to carry off seepage from the canal. If such seepage no longer existed I see no obligation upon the State to maintain the ditches.

The claim should be dismissed.

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MILFORD D. WHEDON v. STATE OF NEW YORK**No. 2213-A****(Dated February 26, 1916)**

Claim based upon an express contract made by a tribunal or officer of the State cannot be heard by the Court of Claims until it has been rejected in whole or in part by the officer having authority to audit same.

The claimant rendered certain legal services and incurred certain expenses in investigating and preparing for the trials of certain actions growing out of the Great Meadow prison investigation. The appointment of claimant to aid in that investigation was made orally in 1913 by former Governor William Sulzer, under section 8 of the Executive Law. Several questions have been raised by the State to show that the appointment was invalid, but the Court of Claims held that it was not necessary to pass upon them, because the court has no jurisdiction to try the claim, as it has never been rejected by any officer of the State. Under section 8 of the Executive Law, even though he had an order from the Governor and a warrant from the Comptroller before the Treasurer was authorized to pay him, he could not have had recourse to this court, as his claim shows it had never been rejected by any officer of the State. Claim dismissed and claimant referred to the proper officer for the audit and determination of his claim or to the Legislature for an enabling act.

CLAIM for legal services rendered and expenses incurred by claimant in investigating, preparation for and trials of actions growing out of Great Meadow prison investigation.

Milford D. Whedon, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

RODENBECK, P. J.— This is a claim for legal services rendered and expenses incurred by the claimant in the investigation, preparation for and trials of actions growing out of the Great Meadow prison investigation.

The claimant, it is claimed, was orally designated and appointed

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to perform such services on August 6, 1913, by former Governor William Sulzer under and by virtue of section 8 of the Executive Law.

The right of the claimant to recover is challenged by the State on various grounds. It is claimed that the appointment was void because it was not in writing. The statute under which the appointment was made requires no such written appointment, but the State claims that there must be read, with the section of the Executive Law under which the appointment was made, section 8 of the Public Officers Law which provides that the commission of every officer appointed by the Governor shall be signed by him and attested, under the seal of the State by the Secretary of State. The appointment is also questioned because it was not filed as required by the same section of the Public Officers Law with respect to commissions granted by the Governor, and also because the Comptroller was not notified pursuant to section 16 of the State Finance Law, which provides that whenever any liability of any nature shall be incurred by or for any officer, notice that such liability has been incurred shall be immediately given in writing to the State Comptroller. The right to recover is also challenged upon the ground that the compensation was not fixed as provided by section 8 of the Executive Law and no appropriation being available at the time of the appointment, that the Governor was without power to make such an appointment, section 35 of the Finance Law providing that no State officer shall contract any indebtedness on behalf of the State nor assume to bind the State in an amount in excess of money appropriated or otherwise lawfully available.

These objections present serious questions with reference to the right of the claimant to recover. But the court has not found it necessary to pass upon these objections specifically, because it has reached the conclusion that it has no jurisdiction to entertain the claim. One of the limitations upon the jurisdiction of the court is, that it shall not extend to any claim submitted by law to any other tribunal or officer for audit or determination, except where the claim is founded upon express contract and has been in whole or in part rejected by such tribunal or officer; that is,

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assuming that the claim is based upon express contract, this court has no jurisdiction of the claim unless it has been rejected in whole or in part by the officer having authority to audit the same. Under the statute under which the claimant seeks to recover he was required to be paid by the Treasurer out of any appropriations made for the purpose for which he was appointed "upon the order of the governor and the warrant of the comptroller." Executive Law, § 8. Under this language, in order to obtain his compensation and expenses claimant was required to obtain from the Governor an order and from the Comptroller a warrant before the Treasurer was authorized to pay him. Upon the refusal of any one of these officers to observe the statute he had a remedy by mandamus to compel performance; but at any rate upon their rejection of the claim in whole or in part he could have recourse to this court. His claim shows that it has never been rejected by any officer of the State. The statement in the claim is, that it has not been submitted to any other tribunal or officer for audit or determination, except that the claim has been submitted to and approved by former Attorney-General Parsons and has been submitted to Governor Glynn. Instead of having been rejected, therefore, the claim has been approved by a former Attorney-General and has been submitted to a former Governor. Under the statute conferring jurisdiction upon this court it is necessary for the claimant to secure a rejection of his claim by the officer having authority to audit or determine the same.

In view of the serious legal questions involved in connection with the regularity of the appointment, it is suggested that authority be obtained from the Legislature to present the claim to this court, waiving the irregularities mentioned which do not go to the merits of the claim. Substantial services were rendered by the claimant and the State should not take the position of depriving him of a recovery for the reasonable value of such services. This court cannot waive the legal requirements necessary to constitute a valid claim since it has no authority to make an award except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. Code Civ. Pro. § 264. The Legislature, however, may waive any legal

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defense except that of the Statute of Limitations and may recognize moral claims upon which recovery could not otherwise be had.

The claim should, therefore, be dismissed and the claimant referred to the proper officer for the audit and determination of his claim or to the Legislature for an enabling act.

Ordered accordingly.

PATRICK McGOVERN & COMPANY v. STATE OF NEW YORK

No. 2375-A

(Dated February 28, 1916)

Damages for changes made by the State in a canal contract necessitating the making of changes in the work and involving increased expenses.

The claimant made a flat bid for building a coffer dam, pumping, bailing and draining but his expenses were increased by reason of the State changing the style of construction of the dam and by the alterations required in the contract; these changes being alleged to represent an addition of \$15,031.65. It is this amount which is sought as damages in addition to other damages caused by excavation changes and metal reinforcements of concrete construction.

CLAIM against the State of New York arising from changes in contracts necessitating increased expenditures by contractor.

Arnold, Bender & Hinman, for claimant.

Egburt E. Woodbury, Attorney-General (Archie Ryder and Joseph P. Coughlin), for State.

RODENBECK, J.—The claimant made a contract known as contract No. 71-A with the State for the dredging of the Hudson river from lock No. 1 to lock No. 2 and for constructing lock No. 1 and dam No. 1 below Mechanicville, N. Y.

When the work had progressed to a certain point the State decided to change the style of construction of the dam and by two

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alterations required the contractor to make certain changes which involved increased expense, for which compensation is now claimed.

One of the claims arises out of the additional cost of constructing coffer dams, pumping, bailing and draining over and above the amount needed to complete the dam as originally planned. The contractor bid a flat sum for the coffer dam, pumping, bailing and draining, and additional compensation is asked for the increased work under this item. The amount bid by the contractor under this item was for the work that was required under the original plans, and he is entitled to pay for any additional work of this character imposed upon him by the alterations to the original plans. This additional work is estimated at the sum of \$15,031.65. This amount represents the fair and reasonable value of doing the work, which of course includes a reasonable profit to the contractor. The measure of damages in such a case is not the cost of doing the work to the contractor, but the fair and reasonable value of the work.

Another item is for reexcavation that the contractor was required to do by reason of the delay of the State while it was deciding upon the changes in the original plans. During this delay a portion of the excavation previously made by the contractor became filled up through no fault of the contractor, and for excavating this material he is entitled to compensation at the rate provided in the contract. The amount of this excavation was 694 cubic yards and the amount to be allowed therefor is \$1,769.70.

A third item relates to a claim for metal reinforcement for concrete construction which the contractor was unable to use by reason of the change in the original plans. This material was charged to the State at the cost to the contractor less the salvage, making an allowance to the contractor of \$254.86.

The claimant is therefore entitled to an award of \$17,056.21.

EMPIRE ENGINEERING CORPORATION v. STATE OF NEW YORK

No. 1823-A

(Dated February 29, 1916)

Extra compensation claimed for certain work on Barge canal contract No. 64 alleged not to be within such contract.

On August 6, 1908, the parties hereto entered into a contract for the improvement of the Erie canal from a point near Prospect street bridge, Medina, to a point between Gasport bridge in Gasport, a strip of almost ten miles. The dispute herein arises over the question as to whether the contract, plans and specifications require the contractor to place coping on the top of the wash wall for the price of two dollars and thirty cents per cubic yard for 60,400 cubic yards mentioned as the eighteenth item of said contract. Claimant entitled to recover.

CLAIM arising from the contention of the contractor that the requirements of his contract on the Barge canal improvement known as contract No. 64, does not require him to place coping on the top of the wash wall for the price of two dollars and fifty cents per cubic yard.

Kellogg & Rose, for claimant.

Egburt E. Woodbury, Attorney-General (Joseph P. Coughlin, Deputy Attorney-General) for State.

RODENBECK, J.— This claim arises out of a contract dated August 6, 1908, between the parties known as Barge canal contract No. 64 for the improvement of the Erie canal from a point 600 feet west of Prospect street bridge, Medina, to 100 feet east of Gasport bridge in Gasport, a total distance of construction of 9.91 miles.

Claimant was to be paid by the State at certain specified prices for the work which was to be done "in accordance with the plans and specifications" attached to the contract and forming a part thereof.

One of the items of work to be performed by the claimant was

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designated as item No. 18 and provided for 69,400 cubic yards of wash wall at two dollars and fifty cents per cubic yard.

The dispute arises over the question as to whether or not the contract, plans and specifications require the contractor to place coping on the top of the wash wall for the price above specified.

There is no separate price provided for coping but the claimant was required for the price stated to place coping wherever it was required by the plans. This provision is found in the section of the specifications which provides that: "When required by the plans, the walls shall be coped with flagstones in length not less than two feet, and the other dimensions as shown upon the plans, roughly dressed and laid close together to grade of elevation shown." § 191.

There is nothing in the printed contract itself to throw any light upon the dispute between the parties except as above referred to and these provisions seem to favor the construction that the claimant was required to cope the wash walls only where such coping is shown on the plans.

The section of the specifications which provides the compensation that claimant is to receive for wash wall is not to be construed as requiring a coping throughout the contract where not shown on the plans, but must be read in connection with the section of the specifications above quoted and to mean that wherever under the contract, plans and specifications the claimant was required to place coping it was not to receive any additional price therefor but was to receive a flat rate for wash wall whether coped or not.

This form of specification as to price is consistent with the form of contract which requires a small amount of coping as well as one which requires coping throughout and in the absence of anything on the plans showing a coping does not of itself indicate an intention to have the wash wall coped except where coping is shown upon the plans.

No coping whatever is shown upon the plans except on the sheets which relate to culvert construction. These sheets can hardly be considered as evidence that the claimant was required to cope the entire wash wall since the specifications provided that it was to cope only where required by the plans. The culvert sheets

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are confined to the culverts and there is a special reason for coping a wash wall around a culvert which does not necessarily apply to an ordinary wash wall on the bank of the canal but even in the case of culverts there is one sheet which fails to show a wash wall, whether through error or through design does not appear.

The remaining sheets of the contract where a wash wall is shown instead of designating a coping rather indicate that it was the design that no coping should be placed on the wash wall, for not only do the sheets showing the prism of the canal which is necessarily upon a small scale fail to show coping but the detailed plan of the wash wall drawn upon a larger scale than the wash wall shown upon the sheets of the prism of the canal fail to show any coping.

The omission from the plans is especially significant when it is considered that the sample provided by the State for indicating work to be done on the Barge canal expressly shows how the coping is to be indicated when required on the top of the wash wall.

It would seem from these considerations that the contract made between the parties did not require coping to be placed on the wash wall except where shown on the plans and that the claimant having been required to place a coping on the wash wall where it was not shown is entitled to recover the reasonable value thereof.

The clause in the contract providing that in case of any discrepancy or ambiguity in the plans, specifications or maps, or between them, the State Engineer shall make a decision in relation thereto which shall be final and conclusive upon the parties has no application as in this case there is no discrepancy or ambiguity. As above stated the plans do not call for a coping on the wash wall except at culverts. This clause of the contract was not designated to give the State the power through the State Engineer to add work to a contract which is not shown upon the plans and not required by any other portion of the contract. The clause in question relates to work which is required but concerning which some discrepancy or ambiguity exists.

The general rules for the construction of this contract are

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well understood and it is not necessary to dwell upon them. The clause relating to inaccuracies and ambiguities is one made by the parties and has its proper sphere of operation which does not extend however to the point of adding work not fairly required by the plans or specifications. It is not the purpose or scope of such a clause to impose work upon a contractor that does not appear upon the plans and cannot reasonably be implied from the plans. It does not confer authority upon the engineer to add additional work and impose unnecessary expense not called for by the contract in express or implied terms.

Similar clauses giving authority to the engineer to give directions as to the performance of a contract have been construed by the courts and there are abundant authorities for a recovery by a contractor where the engineer refused to permit the contractor to perform work called for by the contract (*McMaster v. State*, 108 N. Y. 542; *Byron v. Low*, 109 id. 291) where he gave a wrong grade or other direction and caused the contractor either to do additional work or to do over work already done (*Messenger v. City of Buffalo*, 21 N. Y. 198; *Dwyer v. Mayor*, 77 App. Div. 225; *Grady v. Mayor*, 132 N. Y. 415; *Mulholland v. Mayor, etc., City of New York*, 113 id. 631); where he required the contractor to do work in a way not called for by the contract thus entailing more expensive work than could otherwise be required (*Horgan v. Mayor of New York*, 160 N. Y. 516; *People ex rel. Powers & Mansfield Co. v. Schneider*, 191 id. 523); where he required the contractor to do over work already properly done (*Gearty v. Mayor*, 171 id. 72); or where he required the contractor to do work not called for by the contract. *People ex rel. Powers & Mansfield Co. v. Schneider*, 191 N. Y. 523.

Each case, however, must stand upon its own facts and this case, except for the principles of law enunciated upon the facts established, is not to be construed as an authority for a recovery in all cases where the engineer has assumed to act under the clause in question in this case.

The contract made between the parties is the measure of their obligations and interpreting the contract by the recognized rules of law, claimant is entitled to recover.

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INGALLS STONE COMPANY v. STATE OF NEW YORK

No. 10619

(Dated April 22, 1916)

A lienor having secured judgment against a contractor who had a contract with the State for the erection of a public building held to have a lien which applies only to the amounts due the contractor from the State after the completion of the contract.

The State, in July, 1907, contracted with Clements Construction Company for a New York State School of Agriculture at St. Lawrence University, at Canton. The work began and continued until the 5th of February, 1908, when there was due and payable to the construction company \$2,078.86 and the further sum of \$6,444.15 earned but not payable until the building had been fully completed and accepted by the State. Work on the contract was suspended on the last named date and a number of liens were then filed against the work. The present claimant then began suit against the contractor, the State and other lienors and secured a judgment awarding it the sum of \$1,770.58 with interest. *Held*, that the claimant's lien only extended to the amounts due the contractor from the State after full completion of the contract. When the contractor ceased work the money then owing him was not payable until the performance of his contract, and having failed to perform, the money was never payable to him or to the lienors claiming under him. As matter of fact, the State completed the building under its contract at a sum in excess of the amount which it owed the contractor. Claim dismissed.

CLAIM against the State of New York arising from work done and materials furnished for a contractor with a State contract.

Deyo, Hotchkiss & Carver, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General), for State.

WEBB, J.— While proofs in this case were somewhat voluminous, they were wholly documentary and the point at issue clearly defined.

In July, 1907, the State contracted with Clements Construction Company for a New York State School of Agriculture at

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St. Lawrence University, at Canton, N. Y., to be fully completed for the sum of \$75,471, pursuant to chapter 682 of the Laws of 1906, authorizing the work. On the 5th of February, 1908, there had been considerable amounts of money paid to the contractor, but there was then due and payable to the construction company \$2,078.86, and the further sum of \$6,444.15, earned but not payable until the building had been fully completed and accepted by the State, pursuant to the statute above referred to.

On the last mentioned date the work was suspended by the contractor, and thereafter upwards of twenty liens were duly filed against the work.

Thereafter an action was brought by Ogden H. Tappan and another, lienors, against the construction company, the State of New York, and all other lienors, to determine the amount due the contractor from the State, and the amount and validity of the respective liens.

The contract, which was in evidence, provided that if the contractor failed to perform the work the State might complete it in accordance with the terms of the contract, and pay for such completion, "Out of the unpaid balance of the original contract price if sufficient, and if insufficient collect the deficit from the contractor or his bondsman, in such manner as the State may choose." This provision required the State to spend the unpaid balance of \$6,444.15 on the completion of the building, and limited the State's recovery against the bondsman to the difference between that sum and any increased cost to the State of completing the contract over and above that sum.

The judgment in the action was entered November 24, 1908, and determined that on February 5, 1908, there was due and payable to the contractor from the State the sum of \$2,078.86, and the further sum of \$6,444.15, earned by the contractor, which would become due when the building was completed and accepted by the State, pursuant to the statute authorizing the work, which said sums of money were subject to the costs and expenses of the action and the payment of the liens in the order specified therein. The judgment determined that the costs and allowances of the action, and the plaintiff Tappan's lien, were the first liens upon

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the funds due or to become due the contractor after the building was completed and accepted by the State of New York, and the amount of the liens was payable, "Out of the said funds or so much thereof properly applicable thereto will pay the same," and that the plaintiff should have judgment against the defendant Clements Construction Company for the amount of any deficiency of the lien after applying thereon all moneys properly applicable thereto.

The decree adjudicated the respective liens, including the lien of the claimant in this action, and awarded to the Ingalls Stone Company, "The sum of \$1,770.58, with interest from February 5th, 1908, the amount of its lien filed March 11th, 1908, established herein, or so much thereof as said funds properly applicable thereto will pay of the same," and that said defendant Ingalls Stone Company, "Have judgment against the Clements Construction Company for the amount of any deficiency remaining unpaid, after applying all moneys properly applicable thereto."

In my view of the case the claimant's lien only extended to the amounts due the contractor from the State after the full completion of the contract. When the contractor ceased work the State owed him \$6,444.15, which was payable on the performance of his contract. He never complied with the condition or completed his work, and hence the money was never payable to him nor to the lienors claiming under him. The State completed the building in accordance with the provisions of the contract at a sum in excess of this \$6,444.15.

Great stress was laid on the trial of the fact that two liens subsequent to that of the claimant herein had been adjudicated by the Board of Claims to be valid against the State. This court does not deem itself bound by any such adjudication. On the papers presented this court, the claimant has failed to make out a liability of the State for the indebtedness of the Clements Construction Company to the claimant, and the claim should accordingly be dismissed.

Ordered accordingly.

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WILLIAM PRONATH v. STATE OF NEW YORK

Nos. 930-A and 2435-A

(Dated May 8, 1916)

Damages alleged to have been sustained to farm land by water seeping from the Erie canal.

The claimant declares that a farm owned by him in the town of Ridgeway, Orleans county, on the north side of the Erie canal, was injured in each of the years from 1910 to 1914, both inclusive, to the extent of about \$110 per year, but there was evidence that no such leakage occurred. There is much swale land in the vicinity of this farm and some of it was higher than the canal. Claim dismissed on the ground that claimant had failed to show that the water on his farm came from the canal.

CLAIM against the State of New York arising from the alleged seeping of water from the Erie canal.

Gerald B. Fluhrer, for claimant.

Egburt E. Woodbury, Attorney-General (Frank B. Valentine, Deputy Attorney-General), for State.

ACKERSON, P. J.— The claimant is the owner of a farm in the town of Ridgeway in the county of Orleans in this State which is bounded on the south by the Erie canal. He claims that his farm was damaged by leakage from the canal in the sum of \$110 for each of the years 1910, 1911, 1912, 1913 and 1914.

In this case the State's witnesses say there is no evidence of leakage from the canal; that claimant has some swale lands on his farm and that even they were dry; that there is considerable swale land in that vicinity, some of which is higher than the canal. The witnesses for the State were intelligent farmers and apparently fair and candid men.

There was no effort made on the part of the claimant and his witnesses to show how the water they claimed was on this farm came from the canal — claimant simply says: "When water is

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out of the canal, everything dry; when water is in the canal, everything wet." This is merely assuming that the water came from the canal, but is not proof of that fact. The burden is on the claimant to show that the water he speaks of came from the canal. This he has failed to do.

As was said by Judge Rodenbeck in the case of Perkins v. State, 13 Court of Claims, 98: "The claimants rely upon proof that before the canal was improved in 1897 the land was dry and tillable, and that after the improvement it became wet and untillable. This evidence is insufficient to charge the State with claimant's injuries. Other causes may have produced the result which they allege occurred immediately after the improvement of the canal."

The claim should be dismissed.

Fennell and Paris, JJ., concur.

ARTHUR B. HULL v. STATE OF NEW YORK

No. 1480-A

(Dated May 8, 1916)

Damages resulting from personal injuries received by claimant and to his automobile by collision with a lift bridge over the Erie canal at Gasport, N. Y.

On August 9, 1913, the claimant, while returning from the city of Rochester to his home in Gasport, arrived at the bridge over the Erie canal at Gasport about 8:30 P. M. It was dark and his automobile lamps were lighted; he neither saw nor heard any indications that the bridge was being raised until he was so near it that to avoid collision was impossible. An award of \$1,014 in full of damages to the car and to all injuries to the claimant made.

CLAIM against the State of New York arising from personal injuries received by claimant in colliding with a lift bridge maintained and operated by the State over the Erie canal at Gasport, N. Y.

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Slee & Kent, for claimant.

Egburt E. Woodbury, Attorney-General (George L. Meade, Deputy Attorney-General), for State.

ACKERSON, P. J.— This claim is one for damages against the State resulting from personal injuries received by the claimant and also for injury to claimant's automobile by reason of a collision with a lift bridge maintained and operated by the State over the Erie canal at Gasport, N. Y. On August 9, 1913, claimant alleges that he was returning from the city of Rochester to his home in the village of Gasport aforesaid with his family and others in his automobile; that he arrived at the bridge in question at about 8:30 P. M.; that it was then so dark that it was necessary to have the lamps on his automobile lighted; that he was approaching the said bridge on a long 6 per cent grade from the north; that he was looking and listening for any signal that the bridge was being raised; that he saw nothing and heard nothing to indicate that the bridge was being raised until he arrived within a few feet of the bridge when it was impossible to avoid the collision.

The court is clearly of the opinion that no sufficient warning was given to the claimant that the bridge in question was being raised.

The accident happened in the night time. There was no light of any kind on the bridge, except a red light under the bridge which could not be seen until the bridge was raised about three feet. The gong was struck only three or six times, at most, before the operator started to raise the bridge, and at a time when apparently the claimant was too far away to hear it. The approach to the bridge was an up-grade of about 6 per cent and claimant testified he could not actually see the floor of the bridge until he arrived within about ten feet of it. The claimant was apparently running at a moderate rate of speed as he approached the bridge and together with those in the car with him, was endeavoring to see if the bridge was clear, so that he can not be charged with contributory negligence. He did not hear any warning nor

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see that the bridge was being raised until just the instant before he struck it.

In the case of *Berenstein v. State*, 13 Court of Claims, 143, the court used this language: "Before the bridge was raised, the gong was sounded, warning all approaching it was about to be lifted. The gong was struck ten or twelve times and was heard twenty-five feet, or more, away. Red lights were placed upon the bridge and so exposed that those expecting to cross it could see the danger signal. The flagman stood before the bridge in the street with a red lantern in his hand giving his warning to stop, and of peril."

The court very properly held that with such precautions the State was not liable to the claimant who ran on the bridge while it was being raised and was injured. But in the case at bar there was absolutely no warning given which claimant could hear or see until just as he was about to collide with the bridge. He could not hear the gong because of the distance he must have been away when it was sounded and because of the noise made by his car. He could not see the red light because the bridge had not raised high enough to expose it. He, therefore, had no warning that the bridge was being raised that enabled him to stop in time. The automobile has become one of the most important means of conveyance over our public highways. It becomes necessary, therefore, that in all situations like the one under consideration some warning must be given which can be seen or heard by a cautious and watchful driver of such machines.

From the evidence in this case, therefore, it clearly appears that the State was negligent in the operation of this bridge at the time in question; that claimant was free from contributory negligence; and that therefore the State is liable to the claimant for such an amount of damages as he suffered by reason of the accident.

It appears from the evidence that the cost of repairing claimant's automobile was \$117 and depreciation of car by reason of accident about \$150; that claimant paid doctor, and for trusses \$81, in all \$348. The balance to be awarded claimant is for the hernia resulting from the accident. Dr. Moore testified that it was more probable that the hernia was the result of the former

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accident than of the one in question, but that it was, in any event, an incomplete hernia which could easily be cured for \$150.

We are of the opinion, therefore, that an award of \$700 for this injury, together with the \$348 above mentioned, in all \$1,048 is ample in this case.

Fennell and Paris, JJ., concur.

KATE B. ACER v. STATE OF NEW YORK

No. 8187

(Dated May 8, 1916)

Damage to agricultural lands caused by water from canal feeder.

The claimant is the owner of 360 acres of land on the Oak Orchard creek, town of Shelby, Orleans county, N. Y., lying but a short distance from Tonawanda creek, between which creek and the Oak Orchard creek the State constructed a canal feeder many years ago, which enters the Oak Orchard creek a short distance below claimant's farm. This farm is almost level and lies on the edge of Tonawanda swamp. The claimant contends that the State has turned so much water into the Oak Orchard creek that the flood complained of was the result. This claim is stale, almost ten years having been allowed to elapse before bringing it to trial. *Held*, that the burden of proof that the damage was caused through the negligence of the State has not been made by claimant. Claim dismissed.

CLAIM against the State of New York for damages alleged to have resulted from the negligence of the State in so flooding a canal feeder as to cause the flooding of claimant's farm.

L. M. Sherwood, for claimant.

Egburt E. Woodbury, Attorney-General for State.

ACKERSON, P. J.— This claim is for damage to claimant's crops between May and October, 1905, caused by flooding. Claimant's farm of 360 acres is situated on the Oak Orchard creek in the town of Shelby, Orleans county, N. Y. The State many years ago constructed a canal feeder from Tonawanda creek to Oak Orchard creek which enters Oak Orchard creek a short distance below claimant's farm. The farm is very level, lying on the edge of what is known as Tonawanda swamp. The claimant contends

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that the State through this feeder has turned so much water into the Oak Orchard creek that it caused the flood in question.

The contention of the claimant may well be scrutinized closely for the reason that the claim has not been brought to trial promptly but has been allowed to sleep for about ten years. Also, from the further fact that on the 17th day of January, 1906, when claimant swore to her claim, and when presumably the facts constituting it were fresh in her memory, she only asked \$1,800 damages, and on the 24th day of September, 1915, when the claim was tried, she proved \$3,470 damages. The wonderful growth this claim has made in ten years is illustrated by the following table:

Crops	Damages claimed in 1906	Damages claimed in 1915
90 acres of hay	\$900	\$1,800
60 acres of oats	540	540
12 acres of corn	180	240
2 acres of potatoes	60	80
8 acres of beans	120	160
65 acres of pasture	0	650
Total	\$1,800	\$3,470

It is wonderful how the memory of claimant's husband, who had charge of the farm and who gave the items, as he testifies, to claimant's attorney which were inserted in the claim, has so improved by time that after the lapse of ten years he can remember so clearly that he can swear that he overlooked about one-half of the damage when the claim was drawn.

The claim is for damage for flooding in 1905. The evidence offered to prove the State's liability is the testimony of witnesses taken in 1903 as to the flooding of the same premises in 1902. The burden is upon the claimant to show that the damage was caused through the negligence of the State. The claimant cannot meet and overcome that burden by evidence of what took place in 1902. Conditions might be entirely different in 1905 than in

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1902. If the rainfall in the natural watershed of Oak Orchard creek was sufficient to cause the creek to overflow its banks and flood claimant's farm, irrespective of any other cause, then it is immaterial what the State did.

The claimant's position is that by reason of water being brought through the feeder constructed by the State from Tonawanda creek and other places outside of the Oak Orchard creek watershed, that it so raised the water in Oak Orchard creek as to cause it to overflow claimant's farm and thereby inflict the damage complained of. But he undertakes to prove this by what happened in 1902 instead of 1905. Between those dates the channel of Oak Orchard creek was enlarged and the guard-gates at the head of the feeder were repaired to prevent the water from coming into the feeder from Tonawanda creek. See evidence of Horace Andrews, p. 136, stenographer's minutes; of Mark Welsh, at p. 172, and Mr. Wald at p. 136 of stenographer's minutes. The claimant therefore has failed to show that the rainfall on the Oak Orchard creek watershed during the time in question could have been carried in the channel of that creek without flooding, and has also failed to show that the flood in question was caused by the negligence of the State.

The claim must therefore be dismissed.

A. D. FRANKS *v.* STATE OF NEW YORK

No. 9512

(Dated May 11, 1916)

Damage resulting from the taking of stone fences by a State contractor for use in the construction of a highway.

In 1908 claimant was the owner of certain lands in Arkville, Delaware county, and the State constructed a State highway along said lands. This highway was built for the State by a State contractor, and the latter used the stone fences in constructing the highway. *Held*, that

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the damages were caused by an individual action of the contractor, and that he and not the State should be looked to for compensation, as he was acting entirely outside the scope of his contract when he assumed to place spoil on lands not provided by the State as spoil area. Claim dismissed.

CLAIM against the State of New York for damages to lands by the action of a State highway contractor.

George B. Russell, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

FENNELL, J.—In October, 1908, claimant was the owner of land in Arkville, Delaware county. At that time the State, through a contractor was constructing a State highway along said land.

Stone fences were taken by the contractor and used in the construction of the highway. Stumps, stones, gravel and debris were thrown from the highway by the contractor in the progress of the work on to the lands of the claimant, causing substantial damage to the claimant.

It did not appear upon the hearing of the claim that the State had appropriated, either permanently or temporarily, lands upon which the stumps and debris were thrown, nor did it appear that the State had appropriated the stone fences, nor did it appear that the State had made any map showing the contractor had the right to use such lands for spoil purposes, or such stone fences for construction purposes.

The act of the contractor was not within the purview of his contract and was his individual act done for his own convenience and upon his own authority. The contractor was as much bound to pay for the stone fences used in the construction of the road as he would have been to pay for trap rock, limestone, rock or other materials brought from a greater distance. The contractor was acting entirely outside of the scope of his contract when he

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assumed to place spoil on lands not provided by the State as spoil area.

The contractor and not the State is responsible for the acts complained of.

The claim should be, and is, dismissed.

ROBERT H. ASH *v.* STATE OF NEW YORK

No. 9511

(Dated May 11, 1916)

Damages caused by action of a State highway contractor in taking stone fences and using them in constructing a highway and throwing spoil on claimant's land.

In 1908 claimant was the owner of certain lands at Arkville, Delaware county, along which lands the State, through a contractor, built a State highway. The contractor used the stone fences in building the highway and threw spoil upon claimant's land. *Held*, that the act of the contractor was not within the scope of his authority and he, not the State, is responsible. Claim dismissed.

CLAIM against the State of New York for damages to lands caused by the action of a State highway contractor.

George B. Russell, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

FENNELL, J.—In October, 1908, claimant was the owner of land in Arkville, Delaware county. At that time the State, through a contractor, was constructing a State highway along said land.

Stone fences were taken by the contractor and used in the construction of the highway. Stumps, stones, gravel and debris were thrown from the highway by the contractor in the progress of the

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work on to the lands of the claimant, causing substantial damage to the claimant.

It did not appear upon the hearing of the claim that the State had appropriated, either permanently or temporarily lands upon which the stumps and debris were thrown, nor did it appear that the State had made any map showing the contractor had the right to use such lands for spoil purposes, or such stone fences for construction purposes.

The act of the contractor was not within the purview of his contract and was his individual act done for his own convenience and upon his own authority. The contractor was as much bound to pay for the stone fences used in the construction of the road as he would have been to pay for trap rock, limestone, rock or other materials brought from a greater distance. The contractor was acting entirely outside of the scope of his contract when he assumed to place spoil on lands not provided by the State as spoil area.

The contractor and not the State is responsible for the acts complained of.

The claim should be, and is, dismissed.

ELBRIDGE KELLEY v. STATE OF NEW YORK

No. 9513

(Dated May 11, 1916)

Damages caused by a State highway contractor taking stone fences and using them in constructing a highway and throwing spoil on claimant's land.

In 1902 claimant was the owner of certain lands at Arkville, Delaware county, along which lands the State, through a contractor, built a State highway. The contractor used the stone fences in building the highway and threw spoil upon claimant's land. *Held*, that the act of the contractor was not within the scope of his authority and he, not the State, is responsible. Claim dismissed.

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CLAIM against the State of New York for damages to lands caused by action of a State highway contractor.

George B. Russell, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

FENNELL, J.—In October, 1902, claimant was the owner of land in Arkville, Delaware county. At that time the State, through a contractor, was constructing a State highway along said land.

Stone fences were taken by the contractor and used in the construction of the highway. Stumps, stones, gravel and debris were thrown from the highway by the contractor in the progress of the work on to the lands of the claimant, causing substantial damage to the claimant.

It did not appear upon the hearing of the claim that the State had appropriated, either permanently or temporarily, lands upon which the stumps and debris were thrown, nor did it appear that the State had appropriated the stone fences, nor did it appear that the State had made any map showing the contractor had the right to use such lands for spoil purposes, or such stone fences for construction purposes.

The act of the contractor was not within the purview of his contract and was his individual act done for his own convenience and upon his own authority. The contractor was as much bound to pay for the stone fences used in the construction of the road as he would have been to pay for trap rock, limestone, rock or other material brought from a greater distance. The contractor was acting entirely outside of the scope of his contract when he assumed to place spoil on the lands not provided by the State as spoil area.

The contractor and not the State is responsible for the acts complained of.

This claim should be, and is, dismissed.

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W. L. WAPLES COMPANY v. STATE OF NEW YORK

No. 2161-A

(Dated May 11, 1916)

Where the State interferes with the work of a contractor for reasons entirely outside of the contract it cannot escape liability for the results of such interference.

The W. L. Waples Company, the claimant, were successful bidders for the contract of cleaning the exterior walls of the State Capitol at Albany after the fire of March 29, 1911. After the walls were cleaned waterproofing was to be applied thereto. When the contractor was ready to use the waterproofing preparation prescribed by the State, it was discovered that the preparation darkened the stone. The State authorities, under these circumstances, ordered a delay in applying the waterproofing until further investigation could be had. When the State finally designated a proper waterproofing preparation the contractor was obliged to rerig twenty-five scaffolds at a cost to him of \$225. The claimant also asks damages for the loss of time of certain employees amounting to \$440, occasioned by an order from the State authorities to stop the cleaning work during the sessions of the Court of Impeachment in order not to interfere with the hearings before the court. *Held*, that the failure of the State to adopt a waterproofing preparation has resulted in damage to the claimants which the State should recompense and that the stoppage of the progress of the work by the State, although within the right of the State, would, nevertheless, be paid for in damages to the contractor. Also *held*, that the indorsement "due and timely service admitted" written upon the notice of intention herein signed by the Attorney-General under date of December 30, 1914, was binding upon the State. Claim allowed.

CLAIM against the State of New York for cleaning, pointing and waterproofing the exterior stone of the Capitol.

William E. Woollard, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

FENNELL, J.—Claimant was awarded the contract for cleaning, pointing, and waterproofing the exterior stone work of the Capitol after the fire which occurred on March 29, 1911. Contract was

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awarded to claimant as the lowest bidder — claimant being lowest bidder by a very considerable amount.

Claimant's method of cleaning the outside of the Capitol building was not by the erection of fixed scaffolds and working therefrom, but by suspending movable scaffolds from the top of the building and raising and lowering the same as do painters in painting the outside of a tall building. The first operation was to suspend a large scaffold from the top of the building and apply a compressed air sandblast to the face of the stone, the expelled sand being caught and returned to the ground in a pipe. When a strip the width of the scaffold was cleaned from the roof to the ground the scaffold was moved to clean another strip in similar fashion. Next, a light scaffold was swung from the top of the wall and the interstices between the stones were pointed. When a strip was pointed from the top of the wall to the bottom, the orderly and economical progress of the work required that the scaffold be raised to the top of the wall and let down again along the same strip while the waterproofing was applied with brushes.

The State had designated the use of Minwax as the waterproofing material. Claimant informed the State Architect that Minwax would darken the stone. Tests were made and the preparation did darken the stone. The preparation was applied to the stone work on the down hill side of the last window toward Eagle street on the ground floor on the Washington avenue side of the Capitol. The stones at that point still show a darkened color. It was determined not to use the waterproofing preparation, but a substitute was not decided upon at the time. Some time later, and on or about September 15, 1913, a substitute preparation was designated by the State Architect. In the meantime claimant had to proceed with his work and in proceeding had to move the scaffolds as the work progressed. Had the waterproofing preparation been determined upon and ready for use it would have been applied immediately after the pointing was finished and before the scaffold used for pointing had been unslung and rerigged for the next strip of wall. The delay in designating the waterproofing preparation required the rerigging of twenty-five scaffolds.

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This rerigging required two hours for three men for each scaffold, at seventy-five cents per hour, making \$225.

It would seem that the failure of the State to designate the substitute waterproofing preparation in time to permit the claimant to apply the same in the orderly and economical progress of the work was not a delay or hindrance under section 9 of the specifications. Section 9 contains the following: "No charges shall be made by the contractor for any delays or hindrance from any cause during the progress of any portion of the work embraced in the contract."

The failure of the State to designate the kind of waterproofing preparation was in reality an actual interference with the progress of the work. It was not a delay or hindrance such as is mentioned in section 9, but was in fact a direct act on the part of the State itself which precluded the claimant from using the customary, orderly and economical methods required in the progress of the work. It was the State's duty to designate, in due season, the kind of waterproofing to be used. It failed in that duty. It is undoubtedly true that the failure was caused by the making of experiments and tests to find out the proper waterproofing preparation to be used. The State official in charge properly delayed the designation until such time as he was satisfied that the right preparation had been chosen. The good faith of the State official in endeavoring to find the right preparation does not relieve the State from its duty to have the designation made in due season. The State should pay this item of damage to the contractor.

The next item of damage claimed by the contractor is the loss of two hours per day of eight men for twenty-five days, at sixty cents per hour, or \$240.

This loss of time was due to an order delivered to the claimant to stop the progress of the work during sessions of the Court of Impeachment. The operations carried on in the progress of the work were so noisy that they interfered with the hearings before the Court of Impeachment. It is contended on behalf of the State that this also is a delay under section 9 of the specifications.

The State had a right to suspend the work, and claimants

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failure to obey the direction to stop the work during the hearings in the Court of Impeachment would have made him guilty of a misdemeanor under the Penal Law (§ 600) as well as becoming liable for a criminal contempt under section 750 of the Judiciary Law.

The order to stop the work, so as not to interfere with the hearings before the Court of Impeachment, was a direct interference on the part of the State and was an arbitrary stopping by the State of the progress of the work undertaken by the claimant under the contract. The stopping of the work was proper and the order made was within the power of the officer issuing it, but this does not relieve the State from its liability for the natural and actual consequences of its own act. The claimant was entitled not to be interfered with by the State in the progress of the work under his contract with the State. It would seem improper to permit the State, for reasons entirely outside of the contract, to directly interfere with the progress of the work which the claimant had contracted to do, and then relieve itself from liability for the interference by saying it was "a delay or hindrance" of the character indicated in section 9 of the specifications.

It is further contended by the State that the claimant failed to file a "notice of intention to file a claim" within the statutory period of six months and in the manner provided by law.

The notice of intention bore an indorsement reading "due and timely service admitted." This admission was signed by the Attorney-General of the State of New York. The indorsement was made December 30, 1914. The contract was made July 29, 1913. The final estimate was made and signed by the State Architect on July 14, 1914, which date is within six months of December 30, 1914. The six months' period did not commence to run until the liability accrued. The liability accrued when the State Architect certified the final payment, in which he did not include the items set forth in the claim and thereby rejected them.

The claim should be and is allowed for \$465.

Claim allowed.

Court of Claims

JOSEPH DERRICK v. STATE OF NEW YORK

No. 6624

(Dated May 16, 1916)

Memorandum of decision denying motion to amend claim.

In June, 1901, claimant was the owner of land along Wood creek, town of Rome, county of Oneida. These lands were overflowed by water from the fifty-six-mile level of the Erie canal. The claim for damages is based upon the contention that the lands were overflowed by the discharge into the creek of water from the Erie canal over a waste weir and through the weir gates. During the hearing the claimant changed attorneys, and the present attorneys requested permission to introduce further evidence. This motion to amend was made fourteen and one-half years after the rising of the claim. *Held*, that the diligence of the present attorneys does not excuse the long delay which actually occurred between the filing of the claim and the motion to amend the same, and that it is too late now, after fourteen and one-half years, to put the burden upon the State of attempting to find witnesses to a condition which should have been brought to the attention of the State more than a dozen years ago. Motion denied.

APPLICATION for leave to amend claim filed November 8, 1902, the claim being heard March 24, 1915.

Davies, Johnson & Wilkinson, for claimants.

Egburt E. Woodbury, Attorney-General, for State.

FENNELL, J.— In June, 1901, claimant's lands, located along Wood creek, in the town of Rome, county of Oneida, State of New York, were overflowed. Claimant alleges in his claim that the overflow was caused by the discharge of waters from the fifty-six-mile level of the Erie canal into the channel of Wood creek; that the additional waters were discharged into the creek over a waste weir and through the weir gates; that the State of New York, through its agents, negligently opened the gates of the waste weir and through said negligence discharged large quantities of water into Wood creek, and from thence on to claimant's lands.

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The claim was filed November 8, 1902, the attorney for the claimant at that time being Charles R. Coville. The present attorneys for claimant became such shortly prior to the beginning of the March term of this court in 1915.

The claim was heard March 24, 1915. At the conclusion of the hearing of the claim the attorneys for the claimant requested that the matter be held open to permit claimant to introduce further evidence.

Attorneys for claimant on January 8, 1916, noticed a motion to amend the original claim. The amendment sets up a distinct cause of action. The notice of motion states the proposed amendment, which is substantially as follows: "That in the construction of the old Erie canal Whitall's creek flowed into the Mohawk river; that said creek was cut off from the river and turned into the canal and became a feeder of the canal; that upon the enlargement of the Erie canal about 1855, a diving culvert was constructed under the enlarged Erie canal to carry the waters of said creek to the Mohawk river; that, at the time of overflow in Wood creek out of which the claim arises, the State permitted the diving culvert carrying Whitall's creek to become clogged up; that the waters so dammed back by the clogged culvert ran through the bed of the abandoned Erie canal into Wood creek; that the waters thus diverted from Whitall's creek added to the flow in Wood creek."

This claim arose in June 1901, and was heard March 24, 1915, nearly fourteen years intervening. The motion to amend is made fourteen and one-half years after the claim arose.

It may well be that the present attorneys for claimant, since the claim was placed in their hands, have used due diligence in the prosecution of this claim and in their attempt to have the claim amended. The diligence of the attorneys now acting for the claimant does not excuse the long delay which actually occurred between the filing of the claim and the motion to amend same. The proposed amendment alleges certain facts which ought to have been contained in the original claim or to have been added by amendment within a reasonable time after the original claim was

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filed. The State not having been notified of the alleged contributing causes of the flood in June, 1901, namely, the additional waters from Whitall's creek, due, as claimed, to the clogged up diving culvert, the State could take no steps toward obtaining evidence as to the clogged up conditions of the diving culvert, nor as to the waters passing through the old abandoned Erie canal channel into Wood creek. It is altogether too late now, after the expiration of fourteen and one-half years, to put the burden upon the State of attempting to find witnesses to a condition which should have been brought to the attention of the State more than a dozen years ago.

AUGUST SCHATAZLE v. STATE OF NEW YORK

No. 10066

(Dated May 19, 1916)

Damages for personal injuries received by claimant by falling from an Erie canal bridge.

On or about April 6, 1910, claimant was injured by falling from what is called the Kellar's bridge, crossing the Erie canal, and forming a part of the highway at Durhamville, Oneida county. *Held*, that claimant has failed to show himself free from negligence. Claim dismissed.

CLAIM against the State of New York for damages for personal injuries received by crossing a canal bridge.

Jeremiah F. Connors, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.— The claimant seeks to recover damages for personal injuries received by him at Durhamville, in the town of Verona, Oneida county, on the 6th day of April, 1910, by falling from what is called the Kellar's bridge, crossing the Erie canal and forming a part of the highway.

Proof showed the claimant at the time of the accident had been a resident of Durhamville about ten years, living north of the

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bridge and east of the canal; that he crossed this bridge constantly and understood its construction; that there was a walk for foot passengers on the south side of the bridge four feet in width and a driveway sixteen and one-half feet in width, on the north side of which was the truss elevation with its vertical posts and diagonal tie rods. There was no horizontal rail or guard on the north side of this bridge except a four by four beam fixed on the roadway close to the supports of the truss. A foot path led to the foot passageway of the bridge on each side.

On the night of the accident it was dark, a slight rain had fallen and the path was somewhat slippery. About nine o'clock claimant was returning from his church and crossed the bridge to his home when he turned back to go to the hotel, walking in the driveway. He heard, though he did not see, a wagon approaching and stepped to the north side of the bridge for safety and fell a distance of more than twenty feet to the bed of the canal, receiving injuries which kept him from his work for six weeks. His right shoulder was severely injured and still troubles him in wet weather, but he has practically regained the use of his arm. It appeared that the bridge in question was the standard type of bridge formerly erected by the State, of which some three thousand are still in use, and was known as a Whipple bridge. So far as appeared no accident had ever occurred on this bridge.

It is unnecessary to decide whether or not the State was negligent in maintaining this bridge without providing a railing or barrier on the north side. To recover damages the claimant must show himself free from negligence contributing to his injuries. For ten years he had been constantly using this bridge knowing there was no such barrier on the north side, and that there was a walk for foot passengers properly guarded on the other side of it. He had the choice to take the walkway provided for foot passengers, which was perfectly safe, or the roadway provided for vehicles with some attendant risk. He deliberately chose the latter, and in so doing I am of the opinion that he was guilty of contributory negligence and his claim should be dismissed.

Court of Claims

PATRICK H. MURRAY v. STATE OF NEW YORK**No. 2560-A****(Dated May 31, 1916)**

Construction of a contract between the claimant and the State as to the amount due him for iron pipe used in connection with the construction of a State highway.

In computing the amount due the contractor on highway contract No. 5446 for the construction of the Interlaken-Trumansburg highway, the only question was as to thirty-six feet of iron pipe furnished at station 633 for a culvert and six feet of iron pipe at station No. 490 to be cut off by order of the engineer. The culvert at station No. 633 was eliminated. These pipe items aggregating three and twenty-eight hundredths tons were provided by the contractor pursuant to written orders of the engineer at the cost of eighty-three dollars and thirty-one cents. The contractor was unable to sell the pipe and the State refused payment for it claiming that no anticipated profits could be recovered by the contractor where the State had made changes in the contract. *Held*, that the contractor did not sue for pipe at thirty dollars per ton which would include such profits but merely asked to be reimbursed for disbursements incurred under the engineer's direction and this right of claim was not waived by the contractor.

CLAIM against the State of New York for iron pipe furnished by contractor.

Ainsworth & Sullivan, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.— The only difference between the parties to the highway contract No. 5446 for the construction of the Interlaken-Trumansburg highway arises over deductions made by the division engineer in the work. Thirty-six feet of pipe were delivered at station 633 for a culvert which later was eliminated; and at station 490 a pipe was cut off six feet by the engineer's orders. This pipe aggregated three and twenty-eight one-hundredths tons, had been placed on the work by the contractor pursuant to the written directions of the engineer, and when so delivered had cost the contractor eighty-three dollars and thirty-one cents. The

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contractor could not sell the pipe and the State would not pay for it, justifying its refusal by the following provision in the contract:

“ 4. The said work shall be performed in accordance with the true intent and meaning of the plans and specifications therefor, which are hereby referred to and made a part of this contract, without any further expense of any nature whatsoever to the state than the consideration named in this contract. The state, however, reserves the right to make such additions, deductions or changes as it deems necessary, making an allowance or deduction therefor at the prices named in the proposal for this work, and this contract shall in no way be invalidated thereby; and no claim shall be made by the contractor for any loss of anticipated profits because of any such change, or by reason of any variation between the approximate quantities and the quantities of the work as done. It is further agreed that any increase in quantities or extra work performed or extra material furnished shall be covered by a supplemental contract as provided in chapter 30 of the Laws of 1909 and the amendments thereto, and that no claim will be made by the contractor for any such items performed or furnished before such supplemental contract shall have been approved by the comptroller of the state of New York and executed by the commissioner of highways as provided by chapter 342 of the Laws of 1913 and amendments thereto.”

The changes made by the engineer were clearly “deductions” and the question presented is whether the contractor is precluded from a recovery because of the clause of the contract above cited.

Obviously it was in the minds of the parties that the State might make such changes in the contract either by way of additions or deductions as it deemed necessary without invalidating the agreement, and with corresponding allowances or deductions as the case might be. If additional work, quantities or material were to be furnished it was agreed that a supplemental agreement should be made before any claim could lawfully be made against the State. If deductions were ordered it was agreed that “no

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claim shall be made by the contractor *for any loss of anticipated profits because of any such change.*"

The construction contended for by the State can only be upheld by ignoring the words, "for the loss of anticipated profits." Standing as they do the contractor's agreement was that if the State made changes and deductions he would not claim anticipated profits on the work eliminated. He nowhere agreed that he would not claim reimbursement for moneys expended in carrying out the engineer's written orders. On the theory of the State the engineer might have eliminated all the pipe at any time before it had been placed as called for by the contract and the contractor would be without redress.

By the accepted rules of construction his agreement not to claim anticipated profits left the way open to claim such damages as he might suffer from the deductions, exclusive of anticipated profits, and that is precisely what he does in this proceeding. He was to receive thirty dollars per ton for his iron pipe when in place as called for in the contract. He does not sue for the pipe at thirty dollars per ton, which would include such profits, but he asks to be reimbursed for his disbursements incurred under the engineer's direction, a claim which is certainly just, and in my opinion was not waived by anything in his contract.

Ordered accordingly.

WILLIS G. KNIGHT and HORACE D. KNIGHT, as Executors of the
Estate of HORACE W. KNIGHT, deceased, v. STATE OF NEW
YORK

No. 2209-A

(Dated July 22, 1916)

Damages arising from the appropriation by the State of premises occupied by three small frame houses belonging to the estate of Horace W. Knight, deceased.

Proof was made as to the value of the land appropriated and \$3,000 was awarded for the premises appropriated. The claimants also ask

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\$5,000 for a mineral spring taken and two gas wells, alleged to be of the value of \$50,000. The decedent at the time of his death did not own the mineral spring; no award was made therefor or for the alleged value of the gas wells, as the proof was that little if any gas from the wells was used at the time of the appropriation.

CLAIM against the State of New York for damages for the appropriation by the State of premises occupied by three small frame houses.

Hogan & Byrne, for claimants.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

WEBB, J.— Upon the trial of this action it appeared the premises appropriated were occupied by three small frame houses, for which houses with the land appropriated, an award is made of \$3,000. Claimants made proof of the total loss of a mineral spring which they claimed was worth \$5,000 and two gas wells alleged to be of the value of \$50,000, for which no award is made. The proofs as to the successful operation of the business of selling mineral water were very unsatisfactorily, and, in my judgment, insufficient to justify an award. Furthermore, the proofs showed the decedent made a gift of that mineral spring to a son, since deceased, and if there was any profit in the operation of the mineral business it did not belong to the claimants.

No award has been made for the gas wells. While the appropriation was made on the 24th day of November, 1914, the proofs on the part of the claimants were to the effect that their entire factory with two dwelling houses had been supplied by gas taken entirely from these wells for many years prior to the appropriation and down to the last-mentioned date, and no artificial gas had been used for that purpose down to the appropriation. The State's proofs showed that artificial gas had been supplied from a neighboring village for the use of that factory continuously for four years and upwards preceding the appropriation. A careful

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consideration of the entire testimony shows that little, if any, gas was used from the wells at the time of the appropriation, and consequently no award was made for the gas wells.

Fennell and Paris, JJ., concur.

FELICE PASSORELLI and TRESA PASSORELLI v. STATE OF NEW
YORK

No. 528-A

(Dated August 18, 1916)

Damages for part of an acre of land appropriated by the State under contract No. 62, parcel No. 3440.

The land in question was taken for a highway and a new canal bridge. The new approach to this bridge is eleven feet higher than the old approach, making the roadway about even with the second story of claimant's property, and resulting in damages for which \$150 was granted.

CLAIM against the State of New York for damages to claimants lands by reason of the change of grade of a highroad.

Signor & Signor, for claimants.

Egburt E. Woodbury, Attorney-General (Harry N. Ehle, Deputy Attorney-General), for State.

WEBB, J.— The premises appropriated by the State, for which this claim is filed, consist of one hundred and thirty-six one thousandths of an acre of land, being contract No. 62, parcel No. 3440. A considerable portion of the appropriation is the claimants' title to the center of the roadway known as the Butts road, adjoining claimants' premises on the east.

The buildings upon the land appropriated were of slight value, placed by the claimants' witnesses at \$300, and the State's witnesses at \$100, in my judgment of no greater value than \$150.

The appropriation was for the purpose of a roadway to the new

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canal bridge. Prior to the appropriation the approach to this bridge began at the claimants' house, and was of comparatively a slight grade. The construction of the new approach to the bridge make the roadway twelve feet higher than the old approach, substantially on the level with the second story of claimants' house, and shut off the former access to their house and barn, greatly to claimants' inconvenience and to the serious damage to their property.

Further, it appeared by the uncontroverted evidence that at the time of the appropriation two conduits existed under the Butts road as it existed prior to the appropriation, which served to drain the water from the former blue line of the canal adjoining claimants' premises on the north, and permitted such waters to continue in their natural course to the east side of the bridge where a culvert existed under the canal connecting with the ditch on the north side thereof. By the construction of the new approach these two conduits were entirely closed, and since the improvement claimants' lands on the south are constantly flooded, and water from one to eight inches in depth stands in the cellar in times of rain and flood. The northerly conduit of the two in question are shown upon the State's map of the premises, together with the culvert, and the evidence substantiating the existence is entirely uncontradicted on the record.

The acquisition of the claimants' rights in that roadway has resulted in water standing upon a considerable portion of their premises and in the cellar of the house, with streams of water flowing down the sides of the embankments upon claimants' premises during every rain, and depriving the claimants of light, air and view from the east side of their house.

The value of claimants' premises prior to the appropriation was placed by the witness at \$1,600 with substantial unanimity. Claimants' witnesses thought their damages were \$1,000 or more, and the State's witnesses estimated them at \$400. A careful review of the evidence presented, and a thorough examination of the premises leads me to the conclusion that claimants' damages for the buildings appropriated were \$150, and for the land appropriated, including the conduits and the change of

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grade on the highway, and the resulting damage to claimants' property to the date of this award, the sum of \$600, making a total award of \$750.

PETER J. QUINN v. STATE OF NEW YORK

No. 1569-A

(Dated September 14, 1916)

Construing a correspondence between the claimant and the secretary of a State commission as to length of time of employment.

The claimant claims \$150 for services rendered the State in the month of April, 1914, as special agent to the State Board of Tax Commissioners. He was employed at that sum as the agreed salary per month. Upon his release he was paid for the exact number of days in the last month that he worked, at the stipulated rate. The question involved herein is whether the employment was by the month and whether claimant should not receive pay for the full month in which his services were dispensed with. *Held*, that the claimant was not entitled to draw pay under the terms of his contract for the entire month.

CLAIM against the State of New York for services rendered under an agreement at a stipulated sum per month where claimant had been dismissed within that period and was tendered pay for less than one month.

William O. Shields, for claimant.

Egburt E. Woodbury, Attorney-General (Harry W. Ehle, Deputy Attorney-General) for State.

ACKERSON, J.— This is a claim against the State for \$150 for services rendered the State in the month of April, 1914, by the claimant as special agent to the State Board of Tax Commissioners. The facts proven upon the trial were as follows: In the month of July, 1913, the claimant was employed by the State Board of Tax Commissioners as such agent at the agreed salary of \$150 per month. The hiring of claimant was consummated by the following correspondence:

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" William H. Sullivan, Norwich. Joseph S. Schwab, New York.

" Thomas F. Byrnes, Brooklyn, Chairman.

" Joseph B. Cunningham, Secretary.

" Charles J. Tobin, Asst. Secretary.

" STATE OF NEW YORK

" STATE BOARD OF TAX COMMISSIONERS

" ALBANY, *July 11, 1913.*

" P. J. QUINN, Esq.,

" 85 West Avenue,

" Buffalo, N. Y.:

" DEAR SIR.— I have been directed by the Chairman to notify you that at a meeting held by the State Board of Tax Commissioners on July 10, you were appointed to the position of special agent, and are hereby requested to report for duty at this office on the morning of July sixteenth.

" Very truly yours,

" JOS. B. CUNNINGHAM,

" *Secretary.*"

" William H. Sullivan, Norwich, Joseph S. Schwab, New York.

" Thomas F. Byrnes, Brooklyn, Chairman.

" Joseph B. Cunningham, Secretary.

" Charles J. Tobin, Assistant Secretary.

" STATE OF NEW YORK

" STATE BOARD OF TAX COMMISSIONERS

" ALBANY, *July 19, 1913.*

" MR. P. J. QUINN,

" 85 West Avenue,

" Buffalo, N. Y.:

" DEAR SIR.— The State Board of Tax Commissioners begs to advise you that you have been appointed a confidential special agent in this Department at a salary of \$150 per month to take effect July sixteenth and you are hereby ordered to report at the office of the County Clerk of Buffalo, to Mr. Owen McManus on July twenty-first. Mr. McManus is at present making certain

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investigations in connection with the equalization of special franchise property in the various towns of Erie county.

“ Very truly yours,
“ STATE BOARD OF TAX COMMISSIONERS,
“ C. J. TOBIN,
“ *Assistant Secretary.*”

“ William H. Sullivan, Norwich. Joseph S. Schwab, New York.

“ Thomas F. Byrnes, Brooklyn, Chairman.

“ Joseph B. Cunningham, Secretary.

“ Charles J. Tobin, Assistant Secretary.

“ STATE OF NEW YORK

“ STATE BOARD OF TAX COMMISSIONERS

“ ALBANY, *July 31, 1913.*

“ MR. P. J. QUINN,

“ 85 West Avenue,

“ Buffalo, N. Y.:

“ DEAR SIR.— The State Board of Tax Commissioners acknowledges the receipt of your letter of July 23rd, concerning the amount of your salary.

“ In reply would say you are advised that the same has been fixed by the Board at \$150 per month; that the Board has no information that it was to be any more and that there is no error in any way concerning the amount thereof.

“ Yours very truly,
“ STATE BOARD OF TAX COMMISSIONERS,
“ THOMAS F. BYRNES,
“ *Chairman.*”

“ 85 WEST AVENUE, BUFFALO, N. Y., *July 14, 1913.*

“ HON. JOSEPH B. CUNNINGHAM, Secretary,

“ State Board of Tax Commissioners,

“ Albany, N. Y.:

“ DEAR SIR.— Your favor of July 11, 1913, notifying me of my appointment to the position of Special Agent to your Honorable Board received, and in reply would kindly ask you to convey my sincere thanks for the same, and that I will endeavor to be present at your office on the 16th, as requested.

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"Knowing that the Honorable Board will never regret my appointment, and that our relations will always be pleasant and satisfactory, with best wishes, I beg to remain.

"Yours very truly,
"P. J. QUINN."

The contract of hiring which the foregoing correspondence constitutes was terminated, as claimed by the State, by the following communication:

"William H. Sullivan, Norwich. Joseph S. Schwab, New York.

"Thomas F. Byrnes, Brooklyn, Chairman.

"Hon. JOSEPH B. CUNNINGHAM, Secretary,

"Charles J. Tobin, Assistant Secretary.

"STATE OF NEW YORK

"STATE BOARD OF TAX COMMISSIONERS

"ALBANY, *April* 8, 1914.

"Mr. PATRICK J. QUINN,

"c/o County Clerk's Office,

"Lowville, N. Y.:

"DEAR SIR.— You are hereby notified that at a meeting of the State Board of Tax Commissioners held on this date it was decided to dispense with your services as special agent in this department, and that said services will be discontinued and terminated at the close of business April 9, 1914.

"Very truly yours,

"JOS. B. CUNNINGHAM,

"*Secretary.*"

The only question involved in this case is whether the contract of hiring above set forth constituted a definite employment by the month, and whether the claimant, therefore, should not receive pay for the full month in which his services were dispensed with, as claimed by him.

The claimant received his pay while working as such agent at \$150 a month from the time he was employed up to and including the 9th day of April, 1914. The check for \$45 from the Com-

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mission which was to pay him for the nine days in April, 1914, he promptly returned, and notified the Commission each day in that month that he was ready to perform work for them if they would assign any to him. The contract of hiring as set forth in the foregoing correspondence was for what is known as a general and indefinite term, and under such a contract the employee is liable to be dismissed by his employer at any time without notice and his compensation to cease on the date of his dismissal. The \$150 per month mentioned does not mean that he must be allowed to finish any month at that rate, but it only means that he shall be paid at the rate of \$150 a month for the time which he actually serves in such employment. This precise proposition has been very definitely and specifically decided by the Court of Appeals in the cases of *Edward Martin v. New York Life Insurance Company*, 148 N. Y. 117, and *Watson v. Gugino*, 204 id. 535.

Fennell and Webb, JJ., concur.

FRANK S. O'NEIL v. STATE OF NEW YORK

No. 2763-A

(Dated September 14, 1916)

An official actually in office when a law is enacted providing for a salary is entitled to draw a salary from the time such statute goes into effect.

Frank S. O'Neil, the claimant, was appointed a member of the Athletic Commission of this State on or about July 26, 1911, and continued as such up to October 8, 1915. In the latter year chapter 680 of the Laws of 1915 was enacted taking effect May 22, 1915, providing that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." The Legislature, however, failed to make any appropriation to pay these salaries except an appropriation of \$9,000 for other salaries commencing October 1, 1915. The question here involved is as to the right of the claimant to draw a salary for the period between the time the law went into effect and the time when the salary appropriation began.

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Where the State, by statute, provides that a certain official shall receive a salary, a specific and express contract is created between the State and that official which cannot be avoided merely because the State neglects to appropriate money to pay that salary. *Held*, that the claimant is entitled to an award at the rate of \$3,000 per annum from and including the 22d day of May, 1915, to the 1st day of October, 1915.

CLAIM against the State of New York by Frank S. O'Neil, as member of the Athletic Commission of this State, for salary.

Henry D. Patton, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

ACKERSON, P. J.— On or about the 26th day of July, 1911, the above named claimant, Frank S. O'Neil, was appointed a member of the Athletic Commission of this State and continued to act as such down to October 8, 1915. At the time of his appointment no salary was provided for the Commissioners.

By chapter 680 of the Laws of 1915, which took effect May 22, 1915, it was provided that "Each member of the commission shall be entitled to receive an annual salary of three thousand dollars and his actual necessary traveling and other expenses incurred by him in the performance of his official duties." No appropriation, however, was made by the Legislature to pay the salaries of those Commissioners, except an appropriation of \$9,000 for their salaries commencing October 1, 1915.

Claimant contends that inasmuch as he was a Commissioner in the performance of his duties when the law took effect providing for a salary, that he should commence to draw a salary from that time. We believe the claimant's contention is well founded. The State contends that this court has no jurisdiction to hear and determine this claim, for the reason that the claim has heretofore been submitted to the Comptroller of the State of New York for his audit and by him disallowed. We do not agree with the learned Attorney-General that this is the case. The payroll of the said Commission was submitted, it is true, to the Comptroller, not for audit and determination, so far as this salary was

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concerned, but for payment, and the Comptroller did not endeavor to audit or determine the claimant's claim for salary upon its merits nor make any ruling as to its legality, but, as is clearly shown by his letter of October 7, 1915, attached to the stipulation of the facts in this case, simply refused to pay the salary because the Legislature had failed to appropriate any funds for the same. The tenor of the Comptroller's letter is rather an admission of the validity of claimant's claim, and that the only reason for not paying it by him was that he did not have any money to pay it with.

Chapter 680 of the Laws of 1915, above mentioned, which provided that these Commissioners should have a salary of \$3,000 per year, became a law the 22d day of May, 1915. The State became liable from that time to pay that salary to these Commissioners, provided there were any such Commissioners in office and duly acting at that time. The claimant then was a Commissioner, performing his duty as such, and he cannot be denied this salary which the law plainly provides that he shall receive, unless it can be spelled out from the act that the provision relating to salary was to apply only to the new Commissioners to be appointed or was to be effective only in the event that an appropriation should be made therefor. We find nothing in the statute which contemplates either of those contingencies, but the provision relating to salaries is plain and unqualified, that the Commissioners should receive a salary of \$3,000 a year, and no date being mentioned in the statute when that provision should go into effect, it must have gone into effect when the law became operative as a statute of this State, on the 22d day of May, 1915.

It is apparent that when the State declares in the most solemn manner which it is possible for it to do by act passed by the Legislature and signed by the Governor, that a certain official shall receive salary, that creates a specific and express contract between the State and that official, and an obligation which cannot be avoided by the State simply because afterwards the Legislature either fails, neglects or refuses to make an appropriation to pay that salary. If this is not the case in any law creating an office

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and providing a salary, where an officer has performed his duties under the law providing for his appointment and for his salary, it is absolutely meaningless and no public officer would know whether he was to have any salary or not until sometime perhaps in the future when the Legislature should pass an appropriation bill. Then only could he determine whether or not he was to receive any salary.

We believe that there is ample judicial authority to sustain the contention of the claimant in this case. See *Fisk v. Jefferson Police Jury*, 116 U. S. 131; *Johnson v. Hudson River Railroad Company*, 49 N. Y. 455; *People v. Butler*, 147 id. 164; *Young v. City of Rochester*, 73 App. Div. 81; *People ex rel. Smith v. Trustees*, 11 id. 108; *Green v. Purnell*, 12 Md. 333; *State v. Weston*, 4 Neb. 216; *Riggs v. Brewer*, 64 Ala. 282.

The claimant, therefore, is entitled to an award in this case for salary at the rate of \$3,000 per annum from and including the 22d day of May, 1915, to the 1st day of October, 1915.

Fennell and Webb, JJ., concur.

Ordered accordingly.

JAMES Y. GATCOMB v. STATE OF NEW YORK

No. 1636-A

(Dated September 16, 1916)

A person with whom the State Fair Commissioner has made an agreement whereby the latter is to see that a racetrack is kept free and unobstructed has the right to rely thereon and the State is liable for any damages.

The claimant, James Y. Gatcomb, was the owner of a race horse which was conceded to be of remarkable speed and great value. In May, 1913, the claimant was invited by William H. Jones, a State Fair Commissioner, and Henry S. Nealey, racing secretary of the State Fair Commission, to bring his horses to the fair grounds maintained in the city of Syracuse by the State. These grounds contained a racetrack and the horses were to be brought there for racing purposes. The claimant took his horses to Syracuse and trained them on the State Fair grounds. The official in charge of the track promised him that the track would be kept unobstructed. Nevertheless, on the 23d day of June, 1913, a

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contractor was permitted to stretch a cable across the track in the course of his operations and the horse in question ran into the cable and injured itself badly. The racing sulkey was also damaged and the claimant himself was thrown from his driving seat to the ground. *Held*, that the claimant was not guilty of contributory negligence; that the State, under the circumstances, owed him a greater duty than the municipality owes to the traveler upon the public streets, aside from the principle of law laid down in *Storrs v. City of Utica*, 17 N. Y. 104, and a long line of subsequent decisions which follow it making such cases analogous to injuries in a public street. The claimant herein, had a distinct understanding with the fair superintendent as to keeping the racetrack unobstructed. The failure to keep this agreement was the failure of the State and the claimant is entitled to damages for the injuries sustained thereby. Claim allowed.

CLAIM against the State of New York for injuries sustained to a race horse at the State fair racetrack at Syracuse.

Northrup, Tooke, Lynch & Carlson, for claimant.

Egburt E. Woodbury, Attorney-General (Edmund H. Lewis, Deputy Attorney-General), for State.

ACKERSON, P. J.—It appears from the evidence in this case that the claimant was the owner and trainer of trotting horses; that he was the owner of a horse called Gay Audobon, that had trotted a mile in 2:03¾ minutes, and which it was thought would become one of the fastest trotting horses in the world; that said Gatcomb, in the fall of 1912, was invited by William H. Jones, a State Fair Commissioner, and Henry S. Nealey, then racing secretary of the State Fair Commission, to bring his horses to the State Fair grounds at Syracuse the following year to train and trot them there. It appears also that the State of New York maintains on its fair grounds in the city of Syracuse one of the best racetracks in the country, and one of the principal events of the State Fair is the racing upon this track. The higher the grade of race horses secured for participation in these races by the State Fair Commission the greater the inducement, of course, for the public to attend and witness the spectacle, and also the greater the income to the State. It further appears that in response to the invitation of said Jones and Nealey the claimant herein, James Y. Gatcomb, came to Syracuse with his horses in

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May, 1913, and proceeded to train them upon the State Fair grounds; that the said Jones was then superintendent in charge at the State Fair grounds representing the Commission and the State; that he assigned said Gatcomb quarters thereon, and told him that he might train his horses on Mondays and Thursdays, and that the track would be kept in shape for him, and that he would see that the same was not obstructed in any way; that other trainers were training their horses during the same time, but on different days; that soon after coming to the State Fair grounds claimant's attention was attracted to some buildings which were to be moved, and upon inquiring of the said Jones about the matter he found that said buildings were to be moved into and across the racetrack. He spoke to Jones about this proposed obstruction of the racetrack and of its dangers, and Jones assured him in positive language that he would see to it that said track should not be obstructed while he was training his horses, and that said buildings should be moved afternoons or other times when he, Gatcomb, did not wish to use the track; that he, Gatcomb, need not worry about it at all; that he should go ahead and train his horses on Mondays and Thursdays, and if necessary the moving contractor must wait until he had finished training his horses. Gatcomb, believing Jones' statements, and relying upon what he said, went ahead with his training, and upon the 23d day of June, 1913, after he had driven five times around the track, and between the fifth and sixth heat on that day, this moving contractor, who was an independent contractor, or somebody in his employ, was permitted to stretch a cable across the track for the purpose of pulling a building across the track, which cable was attached to a windlass on the side of the track opposite from the building, all unbeknown to Gatcomb until he arrived within 100 or 150 feet of the same, driving his horse at a very high rate of speed, when he was unable to avoid the cable and the horse was severely injured as well as his racing sulkey, and Gatcomb was thrown from the sulkey to the ground, by coming in contact with the cable.

First. The claimant under this state of facts, as developed by

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the evidence in this case, cannot be accused of any contributory negligence. He did everything he could to avoid the obstruction on the track when he saw it, and he did everything he could before that to be assured that there would be no obstruction on the track by calling the attention of the one in charge of the track to this probable obstruction, and he was assured in positive terms that no such obstruction would be allowed, and that the track would be kept absolutely clear.

Second. The State of New York maintained this racetrack, and invited owners of valuable racing horses to come there and train them. It owed to such trainers, therefore, the same duty which a municipality owes to the traveler upon the public streets. It owed even a greater duty to those trainers than the municipality owes to the traveler upon the public streets, from the very nature of the case. Here upon this track horses of great value were to be driven at great speed. It is apparent, therefore, that any obstruction of this track would be of the greatest danger to life and limb; that any obstruction of the track would be liable to cause the death of the horse or the driver, and that if there was to be any obstruction of the track the State must be held to be absolutely bound to see that every trainer who had come to those grounds with its consent for the purpose of training his horses, there at the invitation of the State, and in order to make an attraction which would accrue to the benefit of the State, must have notice and full information of such obstruction, so that he would be sure to avoid the track at such times. This, in the view of the court, was the obligation of the State, without any specific or special agreement in relation to the same. Without any special or specific agreement in relation to the same, the case is analogous with the case of a traveler upon a public street injured through the act of an independent contractor. The law which the Court of Appeals laid down in the case of *Storrs v. City of Utica*, in 17 N. Y. 104, and which has been followed by a long line of decisions, is the same principle which applies here, except, as the court has above indicated, that principle should be applied here in a case where the State is maintaining a racetrack where

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horses are to be driven at a high rate of speed a great deal more rigorously, if that is possible, than it should be applied to the case of an injury in a public street. Therefore, even though there had been no contract or agreement or talk between the State Fair Commission and this claimant about keeping the track free from obstructions, the State would be liable to the claimant for what damages he suffered by reason of this injury.

Third. But in this case the claimant does not depend for redress upon the principle of law above stated, but depends for his redress upon the fact that he had a distinct, unqualified and specific understanding with the member of the State Fair Commission who was the then superintendent and in charge of the State Fair grounds that this track on the particular forenoon in which his horse was injured should be kept free from the particular obstruction which did cause the injury. The attention of the said superintendent, William H. Jones, was called to the fact that these buildings were about to be moved across the track, and it was then that he stated to the claimant that he would see that they should not interfere with his training in any manner whatever. Then, regardless of any other principle of law, the State became absolutely bound to keep this track clear and free from this specific obstruction to which its attention had been called, and which it had guaranteed should not in any manner interfere with the track or with the training of the horse in question thereon. The claimant relied upon this promise and agreement of the State through its State Fair Commissioner, as he had a right to do. The said State Fair Commissioner, representing the State, absolutely failed and neglected to keep his promise to the claimant, and as the direct result of such failure the claimant's horse and sulkey were injured in the manner above set forth.

The only question, therefore, in this case to determine is the amount of damages to which the claimant is entitled. He is entitled to damages to the sulkey in the sum of \$159. Being unable to race his horse in the Grand Circuit that year, for which he had paid \$1,675 entrance fees, he clearly should be reimbursed for that. The difficult question for the court is to deter-

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mine what damage he should be allowed for this horse and how to determine it. In the case of *Reed v. Rome, Watertown & Ogdensburg Railroad Company*, 16 N. Y. St. Repr. 58, 48 Hun, 231, the court laid down the rule of damages in a case similar to this. There plaintiff's trotting horse was injured in being transported by said railroad company. On the trial the plaintiff was permitted to prove by the opinion of witnesses the value of the mare both before and after her injury. The court also permitted him to prove her speed and value assuming that she possessed that speed. Adopting that rule in this case, we are of the opinion that this horse was fairly and reasonably worth immediately before his injury the sum of \$15,000, and there is no evidence in the case to show that at any time since the injury said horse has been or is worth more than \$4,000. The damage to the horse, therefore, under this rule, would be \$11,000, which, together with the damage to the sulkey and the damage for entrance fees, would amount to the sum of \$12,834. We think that the claimant is fairly and justly entitled to an award for this amount, on the law and the facts in this case.

Fennell, J., concurs.

Award accordingly.

CHARLES E. McDONALD, as Administrator, etc., of JAMES W.
McDONALD, Deceased, v. STATE OF NEW YORK

No. 1178-A

(Dated September 19, 1916)

Injuries received by James W. McDonald resulting in his death by falling through a hole in a highway bridge.

The claimant's, intestate, about 9 P. M. on the 3d of February, 1913, attempted to board a car passing on Main street in the city of Lockport; the car failed to stop and he followed it to where it passed over a bridge and while still following it he fell through a large hole in the bridge a distance of fifty feet down to the rocks below. *Held*, that the bridge was a part of a State highway and that the State was guilty of negligence in failing to keep it in repair and must be held liable for such negligence.

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CLAIM against the State of New York for personal injuries resulting in death from the failure of the State to properly repair a highway bridge.

Van Gorda, Holt, Hickery & Crane, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

WEBB, J.— The proofs in this action show that the deceased, who was a resident of Buffalo, on February 3, 1913, went over to the neighboring city of Lockport, and about 9 o'clock P. M., the next day attempted to board a surface railroad car to return to his home. He waited on the sidewalk at the corner of Main and Cottage streets, and when a west bound car came along he stepped out to the middle of Main street for the purpose of boarding it, the car passed him without stopping and so he followed to catch it. The car had then left the pavement on Main street and was on the bridge, and he, following, fell into a large hole, through the bridge, dropping fifty feet on the rocks below where he met his death.

The proofs showed that the agents of the State were constructing a large bridge across the Barge canal at Main street; that the structural portion of the bridge had been pretty well completed, but it had not been covered with pavement on the north side of the tracks crossing on the bridge, and on the north side there existed some openings which were wholly unprotected. It was in one of these holes, just at the east side of the bridge where it met the pavement, that the deceased fell. A fence had been constructed in the highway on the north and south sides of the single track of the railway where it met the highway on the south side of the bridge, the railroad track was diagonally across the bridge and not at right angles, and where it met Main street on the south side there was an open way some twelve feet wide left for the passage of the cars from the pavement on to the bridge. Red lights were provided and hung from the fence, both on the north and south sides of this opening where the tracks were laid, but there was no guard or obstruction of any kind to prevent travelers from following the line of track from Main street to the bridge, and the street at that particular point was very dimly lighted.

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It was urged upon the trial that the existence of the fence and lights on each side of this railway opening to the bridge was a sufficient warning to travelers of the dangerous nature of the locality, and that the fact that the claimant ran after the car as it proceeded to the bridge, taken in connection with the lights, fence and debris, showed conclusively his contributory negligence within the requirement of the statute.

I do not think so. It was the duty of the State in the construction of this bridge to guard the excavation in such a manner as to make it reasonably safe for travelers. Had there been no bridge there it could hardly be claimed that the State had properly guarded the excavation if it had left a twelve-foot opening in the fence unlighted, with nothing to prevent a traveler from walking into the excavation. It did leave such an opening in the fence after the bridge had been practically constructed, but before it had been floored, and almost at the point of contact between the highway and the bridge it left spaces or holes, where the flooring of the bridge should have been, sufficient in size to imperil travelers. No watchman guarded this entrance to the bridge, no electric lights illuminated the dangers of the locality, no movable obstruction had been provided, it was open to everyone so far as the proofs showed. The claimant was wholly unfamiliar with the situation. He followed the car as it rolled on to the bridge and being immediately behind it attempted to reach the door of the car. I fail to see where he was negligent in assuming that he might lawfully travel a highway upon which a surface car was proceeding safely a few feet ahead of him.

It appeared that the place of this accident was constantly traveled, four or five side streets centered at this point, and the open spaces were some two acres in extent. The situation called for a movable barrier at the point of contact with the bridge and Main street, or a watchman to protect travelers.

The facts show negligence on the part of the State, and following the decision in *Chisholm v. State of New York*, 141 N. Y. 246, it must be held liable for the consequences of its negligence.

Ackerson and Fennell, JJ., concur.

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GEORGE S. WRIGHT v. STATE OF NEW YORK

No. 3023

(Dated September 19, 1916)

Damage by failure of State to pay amount alleged to be due for overtime work as lock-tender on the Erie canal.

In 1893 and 1894 the claimant was a lock-tender at lock 39 on the Erie canal in or near Little Falls, Herkimer county. The claimant received forty-two dollars and fifty cents a month, he worked twelve hours a day, and now claims that, under chapter 385 of the Laws of 1870, he was entitled to pay for overtime, and is now entitled to twenty-one dollars and twenty-five cents per month in addition to what he has already received. The State contends that lock-tenders are not within the purview of the statute cited. *Held*, that the word "workmen" is broad enough to include lock-tenders who receive forty-two dollars and fifty cents per month.

CLAIM against the State of New York for moneys alleged to be owing to claimant as lock-tender.

Richard Hurley, for claimant.

Egburt E. Woodbury, Attorney-General (Michael H. Quirk, Deputy Attorney-General), for State.

ACKERSON, J. The claimant herein was a lock-tender at lock 39 on the Erie canal in or near Little Falls in the county of Herkimer, State of New York, during the season of navigation in the years 1893 and 1894. The claimant was appointed to such position by the Superintendent of Public Works of this State at the monthly salary of forty-two dollars and fifty cents. The hours of his work, as regulated by the said Superintendent of Public Works, were twelve hours each day. The claimant received his pay and signed the payroll in the regular way, without making any objection at the time. He now claims that in accordance with chapter 385 of the Laws of 1870, being an act to regulate the hours of labor of mechanics, workmen and laborers in the employ of the State, he was entitled to pay for overtime, and that

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the forty-two dollars and fifty cents a month which he received was simply pay for a month's work composed of days of eight hours each, instead of twelve hours, and that, therefore, he is now entitled to twenty-one dollars and twenty-five cents per month in addition to what he has already received. This precise question was raised in the case of *McCammon v. State of New York*, which was tried in March, 1905, before the old Court of Claims, and is reported in 12 Court of Claims, at page 20, where Judge Rodenbeck wrote the opinion of the court sustaining the contention of the claimant. The State appealed from that decision to the Appellate Division, and the Appellate Division affirmed the decision of the Court of Claims, which is found reported in 117 App. Div. at page 913.

This court finds nothing in the contention now made by the State which in the opinion of the court requires it to make any different decision than was made in the case above cited. It is true that the State now contends that lock-tenders cannot be considered to be within the purview of that statute; that they are not mechanics, workmen or laborers, but they are public officers duly appointed with certain specific powers. The court is of the opinion, however, that the word "workmen" is sufficiently broad in scope to include lock-tenders who received forty-two dollars and fifty cents per month.

Fennell and Webb, JJ., concur.

ORLEY C. TUTTLE and LOTTIE E. TUTTLE, His Wife, v. STATE
OF NEW YORK

No. 2721-A

(Dated September 30, 1916)

Where the State has actually appropriated for the purposes of Barge canal construction a portion of a farm it is obligated to pay, not only for the land appropriated but also consequential damages.

The claimant is the owner of a farm in the city of Rome, Oneida county, of about 270 acres. In June, 1908, the State, for Barge canal construction purposes, appropriated a certain portion of this farm. In 1909, in behalf

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of the State, the then special examiner and appraiser of canal lands agreed with the owners to pay \$3,800 for the land actually taken. The agreement which was in writing contained a clause admitting that the owners claimed also for cutting off certain lands from access and that this damage could not be determined until such time as further appropriations were made by the State from such lands.

The claim of the State, that the court has no jurisdiction of this case because the required notice of claim was not filed, was overruled by the court on the ground that both by the agreement above mentioned and by the partial payment within six years prior to the filing of the claim.

Upon view of the premises by three of the judges of the court it was found to be "a scene of waste and desolation" and the claim was declared by the court to be one of the most meritorious that has been called to its attention. Claim allowed.

CLAIM for damages against the State of New York for purposes of Barge canal construction for land actually appropriated and also for consequential damages resulting from such appropriation.

Albert J. O'Connor, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

ACKERSON, P. J.—It appears from the evidence in this case that prior to June, 1908, claimants were the owners of a farm in the city of Rome, Oneida county, N. Y., of about 270 acres; that in the month of June, 1908, the State of New York for purposes of Barge canal construction, and in connection therewith, appropriated 35.632 acres of said farm. The claimants, therefore, were entitled to pay from the State not only for the land actually appropriated but also for whatever consequential damages resulted from said appropriation to the balance of their farm.

It appears that the claimants did not at that time file any claim for damages against the State, but that on or about the 1st day of December, 1909, they entered into an agreement with H. J. Donaldson, the then special examiner and appraiser of canal lands, whereby they agreed to accept and the State agreed

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to pay the sum of \$3,800 for the land actually taken. This agreement, which was on one of the regular printed forms used by the State for such agreements, had this clause in typewriting: "In this case the owner has a claim for damages by reason of cutting off certain lands from access. This damage, if any, cannot be determined until such time as further appropriations are made from same lands." There was considerable testimony in the case as to how that clause became inserted in the contract and the object and intent of it, and it clearly appeared that the State and the claimants understood at that time and it was their intention that the \$3,800 was only to pay for the land actually taken and that the consequential damages to the rest of the land, that is to the 235 acres not appropriated, was to be determined when a further appropriation, which was then contemplated, should be made. It appears, however, that no further appropriation was made, and the years passed by without any payment from the State to the claimants for the balance of their damage or without any adjudication of the same.

On or about the 15th day of February, 1910, the claimants received the \$3,800 specified in the contract, and from that time until the 18th day of October, 1915, they were patiently awaiting the balance of their money from the State.

Chapter 640 of the Laws of 1915 provided that "The Court of Claims shall have jurisdiction of and may hear and determine any claim against the state heretofore accrued which shall be filed within one year after this act takes effect for compensation or damages for or on account of the appropriation by the state of any lands, structures, waters, franchises, or other property in connection with the improvement of" the canals. Then the act refers to the different acts of the Legislature which provided for the construction of the Barge canal. This act took effect May 14, 1915. This obviated the necessity of complying with that provision of the law which provides that a claim against the State must be filed within two years after it accrues with the clerk of the Court of Claims.

The learned Attorney-General contends that this act of the

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Legislature is unconstitutional, and that the claimants herein cannot recover, because their claim accrued more than six years prior to the filing of the same. It is true that their claim accrued more than six years prior to the filing of the same, but the Constitution does not prohibit the Legislature from passing a law empowering the Court of Claims to hear and determine a claim which has not, as between citizens of the State, become barred by the lapse of time. See State Const. art VIII, § 6. The act does not require the court to ignore this provision of the Constitution nor does it prevent the State from interposing the defense that any claim filed within the time the act provides is barred by the Statute of Limitations.

But the act is in perfect accord with the Constitution in permitting a claim to be filed when the same accrued more than six years prior to the filing, provided that within six years prior to the filing the State has acknowledged the claim in writing or by a partial payment of the same; for in such a case the claim would not "as between citizens of the state be barred by lapse of time."

In the case at bar we have the recognition of this indebtedness to the claimants by the State both in writing and by partial payment within six years prior to the filing of the claim. The question, therefore, here to determine is whether this claim of these claimants is one that as between citizens of the State could have been said to have been barred by lapse of time.

The State acknowledged the existence of this claim on the 1st day of December, 1909, by its written agreement. The claim was filed on the 18th day of October, 1915, which was within six years from the time of the contract above referred to; but, further than that, the State paid a portion of the damages which it owed the claimants on the 15th day of February, 1910. It is plain, therefore, that as between citizens of the State this indebtedness would not have become barred by lapse of time until six years from the date of this partial payment, and the claim was filed in about five years and six months after that time. The filing of the claim was, therefore, legally authorized by chapter 640 of the Laws of 1915.

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This claim is one of the most meritorious that has been called to the attention of this court. Three of the judges of this court have viewed this property, and it certainly is a scene of waste and desolation. At the time of the appropriation this was evidently a fine farm. The Barge canal has been excavated right through the front of the farm, destroying all the buildings and cutting off all access to the farm. In addition to that, a short distance from the Barge canal prism a new channel was excavated through the farm for Wood creek, which was conducted across the farm in this new channel and then into the canal. The result of that has been that Wood creek in going through this new channel has washed away the layer of hard soil which from time immemorial constituted its bed, by reason of the fact that the point where it enters the Barge canal is some eight or ten feet below the natural bottom of the creek. As this hard soil was underlaid with a layer of quicksand the result has been that the banks of the creek have caved in for many feet on each side and several large gullies and erosions have been formed in 235 acres of this farm unappropriated so that the same is nearly, if not completely, destroyed for any useful purpose. This 235 acres of land, therefore, is not only completely isolated, but it has also been practically destroyed by the construction through it of this new channel for Wood creek. The extent of this damage can hardly be realized except by those who actually see it. Every principle of justice and honor and fair dealing calls upon the State to make good the destruction of this farm for all available and useful purposes which it has brought about. The evidence in the case clearly establishes the fact that this farm prior to the appropriation was of the value of \$11,000; that after the appropriation it was worth not to exceed \$2,000. This leaves claimants' damages \$9,000, of which the State has paid \$3,800, leaving a balance due claimants of \$5,200, to which they are entitled, with interest from the date of the appropriation. An award should be made accordingly.

Webb and Fennell, JJ., concur.

Award accordingly.

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VICTORIA KONNER v. STATE OF NEW YORK

No. 1279-A

(Dated October 17, 1916)

Motion by the claimant for leave to amend her claim by including allegations of trespass on the part of the State and motion by State for leave to dismiss claim.

Victoria Konner, the claimant, for some years prior to May 1, 1913, owned a small tract of land in the town of Liberty, Sullivan county, on the east side of a public highway leading from that village to Livingston Manor. Her premises were on a steep hillside arising abruptly from the highway at an angle of about forty-five degrees. The stone retaining wall ran along the base of the hill in front of claimant's premises. In July, 1912, the construction of an improved State highway No. 5223, route 41, on the general site of the existing highway was begun. The State, through its contractor, by means of a steam shovel, removed the retaining wall fronting claimant's premises and took away a portion of the hillside back of it. The result was that about the last of April, 1913, the greater portion of the hill slid down wrecking claimant's house and barn and ruining her property. *Held*, that the State excavation was within the claimant's line and constituted trespass and that the motion made by the State to dismiss the claim should be denied, with an exception to the State.

MOTION to dismiss a claim against the State.

Harry M. Beck, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J.— This claim originally was based upon the alleged negligence of the State. At the opening of the trial, claimant moved to amend her claim by including the necessary allegations to constitute trespass on the part of the State and its employees. A like motion was made at the close of claimant's case to conform the claim to the proof. On these motions, decision was reserved, with the provision by the court that upon the

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rendition of the decision on said motions, the party adversely affected thereby should have an exception to said ruling. The motions are hereby granted with an exception to the State. In my opinion there is no unfairness to the defendant in permitting the amendment. The notice of intention and the claim itself were ample notice to the State of the transaction, and a full opportunity was given to the State for such adjournment and facility as it might desire to meet the amendment.

For some years prior to May 1, 1913, the claimant was the owner of a small tract of land situate in the town of Liberty, Sullivan county, on the easterly side of the public highway leading from the village of Liberty to the village of Livingston Manor. Her premises were located on a precipitous hill, which rose abruptly from the highway at an angle of about forty-five degrees. Prior to the occurrences of 1912, hereinafter mentioned, her house on said premises was situate on said hill, about eighty-five feet from the highway, and at that time there was a dry stone retaining wall, about three feet high, along the base of said hill in front of claimant's premises, and separated from the traveled portion of the highway by the usual shallow highway ditch. The claimant's house was a two-story, fourteen-room frame building, of inexpensive construction, used for the reception and entertainment of summer boarders. There was a cellar eighteen by twenty-two feet under the house, and in the rear thereof a small frame barn. The house was erected at a cost of \$2,500 in 1906. The barn was older. The land, with barn, was sold in 1906 for \$250. Leading from the highway to the house were about twenty stone steps. The soil was a "sort of quick-sand with a hard-pan surface; sort of greasy." Along the westerly side of said highway ran a brook or creek, and during the last twenty-three years prior to July, 1912, the highway had gradually intruded easterly, away from said brook, until the center line of it had moved easterly from its original location about twelve feet toward the site of claimant's house. In July, 1912, the construction of an improved highway — State highway No. 5223, route 41 — on the general site of the existing highway near the claimant's premises

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was begun, and it is conceded that the contractor followed accurately the plans and specifications of the State and its department of highways in the work, so far as it relates to this controversy. The interests of the State in said construction at said point, and the supervision of said work were in charge of employees of the State. In the month of August or September, 1912, the said contractor, acting under the directions of the State, by means of a steam shovel and otherwise, removed the aforesaid retaining wall, and excavated into the earth in the rear thereof a distance of between four and twelve feet, in order to widen the proposed road at that point. The original plans for said work did not include the erection of any new retaining wall along the claimant's premises. In the autumn of 1912 the claimant removed to New York city for the winter and did not return until about May 1, 1913. In October or November, the State, and its employees, discovered small cracks in the surface of the hill on which claimant's premises were situate. Thereafter, the State prepared plans for the erection of a concrete retaining wall at the base of the hill, but before the erection of the same, and at or about the end of April or the 1st of May, 1913, at a time when the soil was in process of thawing, the greater portion of the hill slid from its place over the site of the former retaining wall and of the excavation made by the State's contractor, and upon and over the highway and into the brook. As a result thereof, the claimant's property was ruined and rendered almost worthless, and her house and barn were wrecked and rendered utterly useless, except for such use as may be made of the material thereof. The premises are practically a total loss.

Some question was raised on the trial by the State as to the location of the boundary line of said highway and the premises of the claimant, but from the evidence I find as a fact that the excavation by the contractor at the base of the hill went beyond the line of the highway, and intruded within the close of the claimant, and constituted a trespass on her premises.

It was clearly negligent for the State to have removed the retaining wall at the base of the hill, particularly in view of the

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character of the soil and the precipitous nature of the land, and the location of the claimant's buildings and their proximity to the State's operations. There had been no landslides at this point during many years preceding. The appearance of the cracks in the surface of claimant's land within a few weeks after the State's operations, and the slide of the land itself, when the frost was in process of disappearing in the following spring, establish a satisfactory causal connection between the negligent operations by the State and its trespass on the land of the claimant, and the disastrous results to the claimant which followed. Of course, for the proximate consequence of a direct trespass the liability of the State is undoubted. The experts for the parties differed widely as to the extent of the claimant's loss. In my opinion, the premises were worth prior to the injury \$2,300, and that they were worth \$100 thereafter, and that the damage to the claimant is \$2,200, for which an award should be made to her.

The State contended, as one of the grounds for its motion to dismiss the claim, that the notice of intention to file this claim was not filed within the time provided by law, in that it was filed more than six months from the time, in the month of August or September, 1913, when the acts were performed by the State and its contractor, which resulted in the injury the following spring. In other words, the State contended that the six months' period should be computed from the date of the tort, and not from the date of the injury resulting to the claimant therefrom. This contention is unsound. The statute provides that the claimant shall file her notice of intention "within six months after such claim shall have accrued." Code Civ. Pro. § 264. The statute does not read that the notice shall be filed within six months from the date of the commission of the wrong, or the performance of the act on the part of the State which resulted in the injury. The language of the statute is that the time shall be computed from the date when such claim "shall have accrued." The claim of the claimant did not "accrue" until she had suffered the injury to her premises, with its resultant loss.

From the foregoing it follows that the motion to dismiss the

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claim, made at the trial by the State, decision upon which motion was reserved by the court, with the provision by the court that upon the rendition of such decision the party adversely affected thereby should have an exception thereto, should be, and the same hereby is denied, with an exception to the State.

Ackerson and Paris, JJ., concur.

Ordered accordingly.

ANN SLIVE, an Infant, by ETTA SLIVE, Guardian ad Litem, v.
STATE OF NEW YORK

No. 1903-A

(Dated October 17, 1916)

It is the duty of the State to take reasonable precautions for the protection of the public and individuals.

During the progress of the State fair at Syracuse in 1912, in preparation of a pageant arranged to take place alongside of the Erie canal at North Salina street in that city, a lift bridge was temporarily made stationary. At the conclusion of the pageant the bridge was being lowered, when the claimant was forced forward by the crowd in such a manner that her foot was caught under the bridge as it was lowered, and she sustained the injury complained of. *Held*, that the State was negligent in not operating the bridge so as to avoid injury to the public or to an individual. Motions made by the State for the dismissal of the claim on various grounds denied.

MOTION by the State to dismiss claim.

Ray B. Smith, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J. On September 11, 1912, the State fair was in progress in the city of Syracuse. In connection therewith, as

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had been customary since 1909, there was held on that evening and other evenings during the fair, a street carnival or pageant known as that of the "Mystic Krewe." A large number of children participated on that evening in said exercises, and among them the claimant, then a girl twelve years of age. These exercises took place at a point in said city adjacent to and along the northerly side of the Erie canal, at and near North Salina street, which is connected with South Salina street at that point by a hoist or lift bridge, then, and for a number of years prior thereto, owned, maintained and operated by the State of New York. Incident to the exercises a great crowd of many thousands of people gathered during said evening on North Salina street at said bridge. This had been so each year since 1909.

At the conclusion of said exercises it was necessary for the claimant to cross the canal from North Salina street to South Salina street in order to reach her home. At 6:30 o'clock p. m. of that day, the State, by its employees, raised said bridge to its full elevation above the canal and braced it in its upright position by placing heavy timbers under each corner of it, in preparation for the vast multitude which would cross it while raised. Pedestrians were able to cross it by means of stairways leading to the raised floor of the bridge, when in its upright position. The State, further, in preparation for the advent of the crowd, stationed some additional employees about the bridge, and at the time the bridge was raised, stretched across the entire street, sidewalks included, on each side of the bridge and a few feet from the edge of the canal, an ordinary rope. The bridge was maintained upright throughout the exercises and until 10:30 p. m. when it was lowered. At the north side of it a great crowd of persons, closely massed together, pressed toward the bridge while it was being lowered. In the front rank of this crowd was the claimant, on her way home. As the crowd pressed forward, she was carried with it in such manner that her foot was caught by and under the bridge as it was being lowered, and was bruised and injured. Two of the metatarsal bones adjacent to the small toe of her right foot were fractured. She was under a physician's care for about eight weeks,

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at the end of which time she had completely recovered from her injuries and the normal use of her foot was restored. There are no substantial permanent results therefrom.

The testimony is sharply contradictory, particularly as to whether there was, at the time the claimant approached said bridge, a rope across the sidewalk at the northwest side thereof. I am inclined to regard the testimony on both sides on this particular issue as credible. The employees of the State testify most positively that the rope was placed in position as above stated, and was removed that night after the claimant was injured. The claimant and several of her girl friends who accompanied her, together with a disinterested witness who was in the crowd near her at the time, testified, with equal emphasis, that they saw nothing of any rope and that their passage along said sidewalk was impeded by no barrier or guard of any kind. It is not contended by the State that State employees stationed at the bridge properly guarded, protected or maintained the rope in position, or that they restrained the crowd and kept the latter back and away from the rope. I think the correct inference from all the testimony is that the rope was there and was found there by the State employees some time after the claimant's injury, but that it was either trampled down or raised up by the crowd, as it pressed forward, so that it did not constitute an adequate barrier or protection to the claimant. If this is the correct conclusion to derive from the evidence, the only inquiry is whether the State was guilty of negligence which was the proximate cause of claimant's injury, and whether the claimant herself is free from contributory negligence. I arrive at an affirmative answer to both queries.

There can be no doubt that the State had ample notice of the general conditions which would prevail at the time and place of the accident. The carnival had been in progress on the previous evenings of the same week, and throughout the fair, during the several years prior to 1912, and the same conditions prevailed on all the previous occasions. The State should, therefore, have anticipated the great crowd which surged about the bridge. In fact, the State did so, and took certain measures, inadequate

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though they were, to care for the situation. It assigned extra employees to the bridge. It put great timbers under the floor of the bridge when raised, to provide for the anticipated strain to which the expected crowd would subject it, and it provided ropes across the street and sidewalks, as a barrier while the bridge was raised. Having, therefore, ample notice of the conditions which, in fact, prevailed, and having taken some measures to meet them, it was the duty of the State to make those measures such as would constitute reasonable precautions for protection of the public and individuals, against injury from the operation of the bridge. The fact that the State took some measures to that end is not enough. The measures taken should have been reasonably adequate, under all the circumstances, of which the State had notice, and which the State, in the exercise of due care, ought to have anticipated. As I have said, the State had notice of the conditions, and it was bound to have anticipated the action of the crowd in surging forward when the bridge was being lowered to the street level, and to have protected individuals accordingly.

I am convinced that the State did not reasonably fulfill the duty which was thus cast upon it. The placing of the rope alone at the north side of the bridge was insufficient under all the circumstances. In the exercise of due care, the State should have anticipated that the crowd in its onrush to the bridge would, in the absence of other precautions, do what it did. The State and its employees should have protected the rope from interference, and kept back the crowd therefrom, and restrained it within proper bounds, or should have placed such barriers as would, from their very nature, have fulfilled that function. Failing in this duty, the State was negligent, and that negligence was the proximate cause of the claimant's injury.

The State cannot escape liability by the plea that claimant's injuries were caused by the action of the crowd, for which it is not liable. That factor was one which the State was bound to anticipate and although it was one of the causes of the claimant's injury, it was a combined, concurrent and co-operating cause with that of the State's negligence and not of such character as to

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deprive the State's negligence of its proximate relation to the injury.

Nor was the claimant herself negligent. She was where she had a right to be, and where necessity compelled her to be. She had a right to assume that the State would fulfill its duty to protect her. She was powerless to resist the action of the crowd behind her, and no blame can attach to her action at the time of the accident.

It follows, therefore, that the State, being chargeable with notice of the conditions prevailing, and, in fact, having actual knowledge thereof, and having assumed to provide therefor, was bound to so provide in a reasonably adequate manner, and that the measures which it took, being inadequate, and the failure on its part to do so, being the proximate cause of the injury to the claimant, who was in the exercise of due care, the claimant is entitled to such an award as will properly compensate her for her injuries.

These injuries were not permanent. They were of comparatively short duration, and it is the opinion of the court, under all the circumstances, that the sum of \$400 will properly and justly compensate her therefor.

Motions were made by the State at the trial for the dismissal of the claim on various grounds. Decision on these was reserved by the court with the statement by the latter that upon decision thereof an exception would be granted to the party adversely affected thereby. These motions have been and are denied by the court with an exception to the State as to each motion.

Ackerson and Paris, JJ., concur.

Ordered accordingly.

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MABEL KLEINMEIER, an Infant, by CHARLES F. KLEINMEIER,
Her Guardian ad Litem, v. STATE OF NEW YORK

No. 766-A

(Dated October 17, 1916)

Any private claim against the State is within the jurisdiction of the Court of Claims if based upon such legal evidence as would sustain it in a court of law or equity.

In 1912, the claimant, Mabel Kleinmeier, then fourteen years of age, while passing the State armory at Schenectady, N. Y., was injured by the falling upon her of ice and snow from the armory roof, from which she sustained the injuries forming the subject of this claim. *Held*, that upon the facts shown, which are detailed in the opinion, the State was guilty of negligence. Motions to dismiss the claim denied. Claim allowed.

CLAIM against the State of New York for injuries caused by negligence.

Freyer & Lewis, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

CUNNINGHAM, J.—At about 3 o'clock P. M. of March 22, 1912, the claimant, then a girl of fourteen years of age, in excellent health and physique, was passing along the sidewalk of the public street adjacent to the New York State armory, in the city of Schenectady. A large mass of ice and heavy snow which had accumulated at a point near the intersection of the main roof and the roof of a dormer window of the armory, loosened by some hours of warm weather, slid from the roof and struck the claimant, throwing her to the ground and causing the injuries for which this claim is made. These injuries were very serious. The impact of the falling material against the right arm of the claimant bruised the tissue adjacent to the bone of the arm and hand.

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resulting in decay of the bone of the upper arm. As a result, the claimant, during the two years following her injury, was subjected to several serious surgical operations, both at her home and in hospital. Much of the osseous tissue, being decayed, was removed and splints used to prevent subsequent spontaneous fracture. These injuries and operations were very painful, and it is undisputed that the effects may be recurrent indefinitely in the future. The claimant's arm and hand are mutilated and disfigured very seriously and permanently. For many weeks she was incapacitated from labor and physical activity, and her physical capacity for labor will be permanently restricted. The evidence established that the guard on the armory roof at the point from which the ice and snow fell, was inadequate to prevent such fall, there being no guard whatsoever on the roof of the dormer window at the point in question, and the guard on the main roof at that point being insufficient for the purpose. Frequently, theretofore, large masses of ice and snow had been precipitated from the roof at the same point, and the safety of pedestrians on the public street thus menaced; of all of which the State officials in charge of the armory had ample notice, and to prevent which they had taken no measures whatsoever.

The foregoing facts were undisputed on the trial. The only questions involved are, whether these facts render the State liable for the claimant's injuries, and the amount of such compensation.

The jurisdiction of this court in a claim predicated upon the negligence of the State, its servants or employees, resulting in injury to the claimant is now comprehensive. The development of that jurisdiction and of the present broad and just attitude of the State toward individuals has been progressive. It is fundamental legal principle that the sovereign cannot be sued without his consent. That consent has been somewhat grudgingly given. Its first manifestation was the creation of the original predecessor of this tribunal. To it the State gave jurisdiction, by its statute, in an exceedingly limited class of cases. Thence, progressively, our commonwealth arrived at its present just policy, whereby jurisdiction is conferred upon the Court of Claims by section 264

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of the Code of Civil Procedure, as follows: "The court of claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state, * * * which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. * * * In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. * * *"

By this enactment, the State has consented that this court may determine its liability upon any private claim against it, upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity, subject to certain exceptions and limitations set forth in the statute, which have no bearing upon this claim. *Fifth Ave. Coach Co. v. State*, 73 Misc. Rep. 498; *Herkimer Lumber Co. v. State*, Id. 501; *Burke v. State*, 64 id. 558; *Litchfield v. Bond*, 105 App. Div. 229; *Nussbaum v. State*, 119 id. 744; *Carroll v. State*, 73 Misc. Rep. 516.

The inquiry which this case presents, therefore, is whether the evidence is such as would establish liability against an individual or corporation in a court of law or equity. There can be no doubt that such a liability would be thus established. Both reason and authority dictate the result. The liability for the condition which resulted in the injuries to the claimant may be predicated either upon the ground of negligence or of nuisance. The armory was built by the State and was the property of the State. The State was responsible for any negligent defect in its original construction. The armory was under the control and in the care of the State and its employees. Military Law, §§ 186, 187; *Matter of Bryant*, 152 N. Y. 412. The evidence abundantly establishes knowledge on the part of the State employees of the defective and dangerous condition, for a long period prior to the accident and up to and including the day thereof, and a total neglect on

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their part to properly guard against injury to pedestrians therefrom. Thus, the negligent omission of the State is established.

The fact that with knowledge of existing conditions the State and its employees took no steps to abate the menacing and dangerous conditions which they knew to exist, but permitted the same to continue to the menace of pedestrians for an unreasonable time, renders the State liable also on the theory of nuisance. *Hogle v. Franklin Mfg. Co.*, 199 N. Y. 388; *Walsh v. Mead*, 8 Hun, 387; *Davis v. Niagara Falls Tower Co.*, 171 N. Y. 337; *Thembly v. Harmony Mills*, Id. 598.

The State is thus liable in this claim because upon the legal evidence herein adduced, an individual or corporation under the same circumstances would be held liable in a court of law to the claimant for the injuries which unquestionably she has received.

The motions which were made on the trial by the State to dismiss this claim, decision upon which was reserved by the court, are hereby denied with exceptions to the State.

It is our opinion, therefore, that an award should be made upon this claim which will justify and adequately compensate the claimant for the injuries which she has suffered.

Ackerson and Paris, JJ., concur.

Award accordingly.

LOUISE SANNUCCI, an Infant, by PAOLO SANNUCCI, Her Guardian ad Litem, v. STATE OF NEW YORK

No. 1003-A

(Dated October 17, 1916)

The State, although engaged in doing something within its right, must, nevertheless, proceed with reasonable care for the welfare and safety of the property and persons of individuals.

The basis of the claim herein was the infliction of injuries upon a girl, then fifteen years of age, through the alleged negligence of the State, the facts being stated in full in the opinion. Three questions are involved herein, viz.: whether the wooden stake which caused the injury was

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driven with reasonable and due care; whether the State owed any duty to the claimant requiring such care in placing the stake, and whether the claimant was guilty of contributory negligence. The case of *Dona-hue v. State*, 112 N. Y. 142, distinguished. Claim allowed.

CLAIM against the State of New York for injuries received by negligence.

Ryan & Skinner, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

CUNNINGHAM, J.—On April 21, 1912, and for about two years theretofore, the claimant, who was at that date, fifteen years old, lived with her family in premises on the westerly side of Glenwood avenue, in the village of Medina, in this State. Along the street in front of said premises was a stone sidewalk, from which sidewalk a stone walk led to the front door of the dwelling-house thereon. A beaten dirt path led diagonally across the front yard of the premises from the side door of the dwelling-house to the said street sidewalk, said path being a “short cut” from the side door to the street sidewalk. Some time between the month of January, 1912, and the above date, a surveying force from the office of the State Engineer and Surveyor was engaged in surveying various lot or property lines and boundaries, in the vicinity of said premises, as a preliminary to the appropriation of a portion of some of said premises for the purposes of the Barge canal. In making said survey, one of the State employees drove a stout wooden stake into the ground in the beaten portion of said dirt path, the same being intended to mark one of the corners of the premises occupied by the claimant, and, in fact, so doing. The stake was solidly driven into the ground, and protruded several inches above the surface. The claimant had no knowledge of its having been placed there, or of its existence. While returning to her home, in the dark, on the evening of April 21, 1912, she was walking from the street sidewalk to the side door of her house over the aforesaid path or “short cut.”

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In doing so, her foot struck the stake, causing her to fall to the ground with much violence, and resulting in a serious sprain of her left wrist. She was under the care of a physician for two or three months and was unable to use her hand during that period. There are some very slight results of her injury which may be permanent. There was some testimony to the effect that the radius bone of her arm was broken, but it was unconvincing, and, in fact, it was conceded by the claimant's physician that if it did exist, it was of such a character as to add nothing whatever to the seriousness of her injury in any respect. The claimant paid for medical attention because of her injury, out of her own individual funds and separate estate, the sum of fifty dollars. There was testimony on the part of the State that the stake was driven almost "flush" with the ground, but, for some reason, the employee who actually drove the stake was not placed upon the witness stand and I am convinced that the proper and usual manner of driving such a stake for the purpose it was intended to serve is to drive it "flush" with the surface of the ground. I am equally convinced that this method was not followed in this case. The express and specific testimony of a number of witnesses establishes this fact, and is corroborated by the fact that, except for the stake, the path at the point where claimant fell was smooth and level.

The evidence raises three questions: *First*, if the stake was driven with reasonable and due care; *second*, if the State owed any duty to the claimant which required that due and reasonable care should be exercised in placing the stake; and *third*, whether the claimant was free from contributory negligence. In view of the evidence above outlined, the court is of the opinion that the stake was carelessly and improperly driven, and, assuming that the State, in driving it, owed a duty to the claimant that it should be properly and carefully driven, that the manner in which it was placed constituted actionable negligence, and that this negligence was the proximate cause of the claimant's injury. The court is certain, too, that the evidence establishes the claimant's freedom from contributory negligence. The sole inquiry remaining is the

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second above referred to, to wit, did the State owe a duty to the claimant in the premises, which required that the stake should be driven with reasonable care? The State contends that the stake was not driven on the premises of the claimant, but was driven at the corner thereof; that the State, and its servants, had a legal right to drive it there, and that the claimant was not proceeding over her own premises at the time she was injured, and because of the place of the accident, the State owed her no duty which it violated. We are referred to the decision of the Court of Appeals in the case of *Donahue v. State*, 112 N. Y. 142.

The general rule, which our courts have recognized, as defining the duty of our people, in their relations to each other, is embodied in the maxim *sic utere tuo ut alienum non lædas*. In other words, it may be said as a general proposition, that a man must do the things which he has the right to do, or which are inherently lawful in themselves, if properly done, with reasonable care and due regard for the welfare and safety of the property and person of his neighbor. This is the standard of conduct which applies among individuals within our commonwealth, and it is the standard which the law compels us to apply, as between the State and its citizens. Code Civ. Pro. § 264. This is true, unless the place of the accident was such as to preclude or limit the application of this general rule. It is true that the owner of real property is held to varying degrees of liability for his use of, and his activities upon his own premises, as against an individual, who may be a tenant, an invitee, a trespasser, a licensee, or one thereon by the sufferance of the owner. And it is quite evident that it is some phase of either of these limitations to the general rule that the learned Deputy Attorney-General had in mind in calling the court's attention to the *Donahue* case. There can be no question, however, that that case and these limitations to the general rule, governing the activities of individuals, has no application here. The State did not own the premises occupied by the claimant, nor did the State own the adjoining premises, or the premises whose boundaries it was surveying, or whose corner it was marking. It was engaged in investigation, for map making preliminary to the acquisition of such property

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as it might need, but surely the State was not in the position of owning the property upon which the accident occurred, and upon which the claimant happened to be at the time. The question of ownership of the *locus in quo* is of no importance here, further than to leave no doubt that the claimant was where she had a right to be, and was doing what she had a right to do. Assuming that the State was within its right in making the survey and driving the stake at that point, surely the claimant had as much right there as the State, its employees, or its stake. The Donahue case cannot affect our determination. There, the claimant was injured while on the State's property, where she had no right to be, except by the sufferance of the State, and the Court of Appeals held that the State owed no duty to her of active or affirmative vigilance to keep said premises safe for her, or others, there for their own convenience. Furthermore, it was found specifically by the trial court that the claimant in that case was guilty of contributory negligence.

It follows, therefore, that there was nothing in the location of the accident which modifies the duty of the State toward the claimant and others, to drive the stake in a reasonably careful and prudent manner, under all the circumstances incident thereto. The claimant should receive an award by this court for such an amount as will properly compensate her for the damage she has sustained.

Ackerson and Paris, JJ., concur.

Award accordingly.

JOHN T. MURRAY v. STATE OF NEW YORK

No. 778-A

(Dated October 17, 1916)

Although the breaking down of a lift bridge over the Erie canal was caused by a heavily laden motor truck owned by claimant, the liability of the State is, nevertheless, self-evident.

In 1912, an employee of the claimant, drove a heavy motor truck over the Nineteenth street lift bridge in the city of Watervliet, N. Y.

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While the claimant was so doing, the motor truck was precipitated into the Erie canal by the breaking down of the bridge. A motion was made by the State to dismiss the claim upon the ground that it had not been shown that the bridge belonged to the State; that no negligence on the part of any State officer was established; that the weight of the truck was excessive under the statute, and that the court had no jurisdiction. Upon the facts stated in the opinion, these objections were all found to be without foundation.

MOTION to dismiss claim.

John F. Murray and William H. Murray, for claimant.

Egburt E. Woodbury, Attorney-General (Archie C. Ryder, Deputy Attorney-General), for State.

CUNNINGHAM, J.—The claimant is a building contractor. On November 8, 1912, and for some time prior thereto, he was the owner of a "Pierce-Arrow" motor truck, of five tons carrying capacity. On that date, said truck, driven by an employee of the claimant, and carrying a concrete mixer and appurtenances, was proceeding across the bridge over the Erie canal, in the city of Watervliet, in this State, known as the "Nineteenth Street lift bridge," en route from the Troy Hospital in the city of Troy, to a point in the city of Albany. The truck weighed 4,000 pounds. Three men were on it, weighing approximately 450 pounds, in all. The evidence does not clearly fix the weight of the remainder of the load on the truck, but as we gather therefrom, it was 5,800 pounds. The truck was proceeding in a proper manner and at a speed of less than six miles per hour. The front end of the truck had entirely crossed the bridge, and the rear thereof was still thereon, when some of the wooden "sleepers" or timbers, supporting the plank flooring of the bridge, suddenly broke off sharply, and fell into the canal below, and the plank flooring broke underneath the truck, precipitating the latter violently down upon the steel girders of the bridge, several feet below the floor thereof. As a result, the truck and its load were extricated at considerable difficulty and expense, and the truck was materially injured, necessitating various repairs and causing a

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loss of some days in its use and operation, amounting to a total of \$398.25. This claim is for reimbursement for said alleged loss to the claimant.

The State's evidence indicated upon the trial several grounds of opposition to the claim:

1. That it was not shown that the bridge is a State bridge.
2. That no negligence on the part of any State officer in the construction, care or maintenance of the bridge was established.
3. That the weight of the combined load to which the claimant subjected the bridge was in excess of eight tons, and that this fact exculpates the State from liability.
4. That the evidence would establish no legal liability against an individual in a court of law, and, therefore, not against the State in this tribunal.

I am convinced that there is no merit to any of these contentions and that the claimant should recover.

The bridge was constructed by the State Superintendent of Public Works on plans and specifications of the State Engineer and Surveyor, and at the expense of the State. The statute providing for its construction enacted that, when completed, it should be operated under the Superintendent of Public Works, but at the expense of the town of Watervliet. Laws of 1891, chap. 239. Subsequently, by chapter 905 of the Laws of 1896, the city of Watervliet was incorporated, including within its boundaries the site of the bridge in question. Thereafter, by chapter 714 of the Laws of 1909, it was provided that the said bridge should continue to be operated under the direction of the Superintendent of Public Works but at the expense of the city of Watervliet. Furthermore, Alfred M. O'Neill, assistant to the Deputy Superintendent of Public Works, testified that prior to the accident, the State had maintained the bridge and made such repairs as it deemed necessary. Therefore, the bridge was a "State bridge" and the State was not only liable for any negligence of its employees in the construction of the bridge, but also in its operation and maintenance.

We are of the opinion that the negligence of the State is

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unquestionable. The doctrine of *res ipse loquitur* applies to this case.

The principal contention of the State is that the combined load imposed by the claimant on the bridge exceeded eight tons in weight. In the first place, it affirmatively appears that it was less than eight tons. But, in any event, we are unable to understand why that arbitrary weight should apply. It is true that a *town* is free from liability for the breaking of any bridge under a load weighing eight tons or over. Highway Law, § 331. But this statutory provision has no application here. The Legislature specifically limited it to *town bridges*. By doing so, it can be said fairly that it intended to exclude from any such limitation its own, or the bridges of any municipal corporation other than a town. There is a reason for this policy. Obviously, a different standard should govern the capacity of rural bridges, subjected only to the loads incident to agricultural and other rural pursuits, than which should control bridges in great cities and large communities, with their varied building, manufacturing and commercial enterprises, and the loads which are incident to their operation. So far from the statutory provision above referred to indicating a policy on the part of the State to fix an arbitrary maximum weight of eight tons for all bridges, the proper method of statutory construction requires the very opposite conclusion. Nor can the court say that the weight of the load was unusual or improper, or the defendant negligent. Quite the contrary.

The evidence is such as would establish in a court of law, legal liability in favor of the claimant against an individual or corporation defendant. Were a toll bridge corporation, or a city or county, to be the defendant, under the facts disclosed here, its liability would be definite and certain.

The jurisdiction of this court over private claims against the State is now broad. Code Civ. Pro. § 264. The fundamental test is whether the evidence is such as would establish the liability of a person or corporation in favor of the claimant in a court of law or equity.

We are, therefore, led to the result I have indicated. The

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claimant should recover the amount of the damage which he has established.

It follows that all of the several motions made by the State at the trial, and at the end thereof, for the dismissal of this claim, decision upon which was reserved with the provision by the court that an exception would be granted to the party adversely affected thereby when made, should be and the same hereby are severally denied with an exception to the State as to the denial of each.

Ackerson and Paris, JJ., concur.

Ordered accordingly.

CHARLES F. KLEINMEIER v. STATE OF NEW YORK

No. 765-A

(Dated October 17, 1916)

Motion to dismiss a claim for medical and surgical care of claimant's daughter denied.

This case has already been tried by the court and the present application grows out of a motion made on the trial of the case itself, which was that of Mabel Kleinmeier by her guardian *ad litem* against the State of New York, being claim No. 766-A. The facts are set forth in that case which was reported in Advance Sheets No. 59 of the State Department Reports on page 59 under date of March 1, 1917. Motion to dismiss claim on the trial upon which decision was reversed hereby denied with an exception to the State.

DECISION of a motion to dismiss claim made on the trial of claim No. 766-A.

Fryer & Lewis, for claimant.

Egburt E. Woodbury, Attorney-General (Frank R. Cook, Deputy Attorney-General), for State.

CUNNINGHAM, J.—The claimant is the father of one Mabel Kleinmeier, who was by her guardian *ad litem* the claimant in

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claim No. 766-A, against the State. The principal facts are sufficiently set forth in the opinion of the court in the last mentioned claim. The evidence adduced upon the trial of said claim, by stipulation of the parties, was made part of the evidence herein, in so far as applicable hereto. The said Mabel Kleinmeier resided with her father, the claimant herein, at the time of her injuries and was supported by him. He paid for the medical and surgical care of his said daughter as a result of her said injuries, the sum of \$313.05, which, it is undisputed, was a reasonable and proper expenditure therefor. Our conclusion in the claim of Mabel Kleinmeier against the State, above referred to, is necessarily conclusive here.

The motion to dismiss this claim, which was made on the trial, decision upon which was reserved, is hereby denied, with an exception to the State, and an award should be made to the claimant in the sum of \$313.05.

MARIAN DAVIES v. STATE OF NEW YORK

No. 2290-A

(Dated October 18, 1916)

Proper method of arriving at the actual value of large areas of land appropriated by the State.

The claimant owned seventy-five acres of land near the city of Utica. The lands just north of that city and north of the Mohawk river are almost level for a distance of a mile to a mile and a half to the edge of the river and for several miles along that stream. Near Utica the river makes a bend like a horseshoe. The city of Utica before the construction of the Barge canal straightened the channel of the river so as to do away with annual overflows and allow the extension of the city toward the north for manufacturing purposes. The New York Central and Hudson River Railroad Company and the Standard Oil Company eventually bought small parcels of this land in the reclaimed district at prices of from \$4,000 to \$5,000 an acre. Subsequently a portion of the Mohawk river was taken by the State as a Barge canal harbor for the city of Utica. Claimant owned lands also along this stub end of the Mohawk. The claim is made that this farm was worth over one-third of a million dollars.

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This valuation is based upon the sale of small parcels. *Held*, that to arrive at a correct conclusion regarding the value of these lands, all the facts and circumstances must be considered in fixing the "fair market value." It is the influence of all of them that must determine conclusions including that of farm earnings; that the damages actually amount to \$18,792.15 under the doctrine laid down in *Williams v. City of Utica*, 217 N. Y. 162. Claim allowed.

CLAIM against the State of New York for farm lands belonging to claimant appropriated by the State near the city of Utica.

Miller & Fincke, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook and Michael H. Quirk, Deputy Attorneys-General), for State.

FENNELL, J.—Witnesses for claimant testified that the reasonable market value of the seventy-five acre farm belonging to claimant, from which the appropriation was made, was \$5,000 an acre. Witnesses for the State placed the market value of the same farm at \$400 an acre — a difference of over 1200 per cent. Witnesses for the claimant placed the value of the old river bed at \$4,000 an acre and witnesses for the State at \$100 per acre — a difference of 4000 per cent. All the witnesses for the claimant are in substantial agreement with each other as are the witnesses for the State. Under such circumstances there is no sworn testimony upon which the court can base an award except by using the figures given by claimant's witnesses or the figures given by the State's witnesses. The award must be based almost wholly upon the view of the premises by the judge or judges hearing the claim, which viewing is required by statute. The property in question has been viewed by the judge hearing the claim and by two other judges.

The wide divergence of opinion in the two sets of witnesses makes those opinions of practically no value to the court unless the theory of one set be accepted as the theory upon which the market value ought to be based. It is to be regretted that witnesses, apparently so well qualified, could not get closer together on the market value of the property in question and not lease that

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dependent almost entirely upon the "viewing of the premises by the judges."

The lands north of the city of Utica and north of the Mohawk river are very flat. The United States topographical map of that district shows the twenty-foot contour level from a mile to a mile and a half from the edge of the river,—indicating a strip several miles long and a mile to mile and a half in width where the level does not vary more than twenty feet. The Mohawk river has always overflowed these lands carrying fertilizing silt on to them and made them valuable as farm lands. The value of these lands to a farm is definitely shown by the shape of the farms in that locality, all of the original farms running from the hills on the north down across the gravelly lands and on across the sandy loam deposited on the river level to the bank of the river. Each farm had a portion of Mohawk flat land. The Mohawk river bends gradually toward the north and away from the city for about a mile and then makes a sharp bend toward the city for a greater distance than a mile, runs along close to the New York Central tracks for about a mile, then makes a bend toward the north, curving back immediately, like a horseshoe, to the south and then to the northeasterly to about the middle of the flat lands. The back bend in the river bringing it close to the city of Utica and the annual floodings of the river kept the city from extending to the northward. For a great many years the lands of the claimant and others had a market value simply as farm lands. Some years ago, and before the Barge canal was constructed, the river channel was straightened by the city of Utica from the northerly end of the big bend as above mentioned to the northerly end of the shorter horseshoe shaped bend next easterly. This straightening of the river and the diking of the same give the lands adjacent thereto a value in addition to their farm value. Some of the lands not being thereafter subject to annual overflows, and the river being confined in its new channel, allowed an extension of the city to the northerly for manufacturing concerns and enterprises of a similar nature. In response to this opportunity for enlargement certain small parcels were sold to the New York Central and Hudson River Railroad Company

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and to the Standard Oil Company at prices from \$4,000 to \$5,000 an acre,—the Standard Oil Company buying about five and one-half acres and the New York Central Railroad a few acres. There have been very few sales of any kind of these lands and while the sales which have been made have been at a large price per acre, the acreage purchased was very small compared to the total number of acres in the district similarly situated. The lands in this district have a considerably higher value for industrial expansion purposes than for farming purposes and it may well be that a few acres or portions of acres will sell at the rate of \$4,000 or \$5,000 per acre, but it seems to the court that it can hardly be said that the several hundred acres similarly situated had a reasonable market value in 1913-1914 of \$5,000 per acre. The farm in question was seventy-five acres in extent and in addition there were two and seven thousand two hundred and forty three ten thousandths acres in the bed of the Mohawk, before the river straightening, and afterwards in the bed of the stub end of the Mohawk still under water but not in the then channel of the stream. This stub end of the Mohawk was taken for a Barge canal harbor for the city of Utica. The court cannot agree with the contention of the claimant that this farm was worth considerably over one-third of a million dollars. It is true that certain acres or fractions of acres lying closest to the manufacturing district might, when the demand arose, sell at the rate of \$4,000 or \$5,000 an acre,—particularly if some large corporation wished a particular site for a particular purpose,—as was the case in the purchase made by the New York Central and Hudson River Railroad Company and the Standard Oil Company,—but it can hardly be said that the prices paid for these particular parcels are the true measure of the reasonable market value of the entire acreage similarly situated. Conceding that certain small parcels might sell at the rate of \$4,000 or \$5,000 per acre it might be fifty years before all the land similarly situated would be absorbed in industrial development.

All of the facts and circumstances regarding these lands must be taken into consideration when trying to arrive at the “fair market value.” It is the influence of all the facts and circum-

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stances that influence those who would care to buy or to sell. It is hardly permissible to take actual sales of small parcels and apply them as fixed yard sticks to measure large areas. If claimant's value witnesses are sound in their estimates, it would seem that the owners of several hundred acres similarly situated have been content to accept incomes from farm lands at farm value returns when they might exchange for many millions of dollars ready for immediate investment. Practically the whole of this large acreage similarly situated always had been used for farm purposes and was so used at the time of the appropriation,—excepting of course the portions appropriated for Barge canal work. This fact should be given great weight when considering the estimates of these experts. It would seem, therefore, that the value of the land appropriated varied somewhat in proportion to its distance from the industrial district, which district was near the rail transportation system. The nearest land having a value based upon its probable development and utility for industrial purposes,—the land at the far edge of the flats having a farm value with portions influenced by trend of residence development. Four acres nearest the industrial district would have a fair market value of \$2,000 an acre; the next four acres of \$1,500 an acre; the next three and four hundred and thirty thousandths acres \$1,000 an acre, and the two and seven thousand two hundred and forty-three ten thousandths acres under water \$500 an acre. The land under water is fairly well situated but to be utilized would require a large outlay for filling and grading. The difference in the fair market value of claimant's farm before and after the appropriations amounts to \$18,792.15.

It is understood that the property described in this claim as being in the old bed of the Mohawk is a portion of the Cosby Manor grant, so called, which grant was passed upon in the case of Williams v. City of Utica, 217 N. Y. 162, and the award in this claim as to the land in the old bed of the Mohawk is made upon that basis.

Findings have been drawn accordingly.

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BATTLE ISLAND POWER COMPANY v. STATE OF NEW YORK

No. 1491-A

(Dated October 18, 1916)

Amended claim for the value of four and one hundred and twenty-five one-thousandths acres of land.

In the city of Oswego, between the center of Syracuse avenue, known as the River road, and the easterly line of the Oswego canal along the edge of the Oswego river, is located the property in question. In this amended claim it is the contention of the claimant that the property should be paid for on its "lot values" and that it was worth \$7,500. The advantages of these particular lots are conceded but the reasonable market value of the property held to be based upon the desirability plus probability of individual sale and upon the direction, speed and opportunity for city growth. *Held*, that \$3,000 would be a fair price for the land. An allowance for \$250 is made for the barn on the premises.

AMENDED claim against the State of New York for damages growing out of the appropriation of certain lands in the city of Oswego along the Oswego canal.

Gannon, Spencer & Mitchell, Charles A. Collin, of counsel, for claimant.

Egburt E. Woodbury, Attorney-General (Edward J. Mone, Deputy Attorney-General), for State.

FENNELL, J.— The only question raised by the amended claim herein is the value of four and one hundred and twenty-five one-thousandths acres of land in Oswego lying between the center line of Syracuse avenue (sometimes called River road) and the easterly line of the Oswego canal along the edge of the Oswego river. The property is long and narrow having a frontage of 1,862.3 feet on Syracuse avenue. A portion of the property slopes somewhat steeply to the river bank.

It is the contention of the claimant that the value of the property should be based on its "lot values," as shown on a plot, and that on such a basis the property would be worth about

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\$7,500. While it would have been feasible to divide this property into lots and put it on the market so divided, at the time of the appropriation in April, 1912, it nevertheless cannot be regarded as having had an immediate sale value at that time for all the lots so plotted. The growth of the city of Oswego, during a number of years prior to the appropriation, was not such as to give any reasonable assurance of marketing all of these lots except after the lapse of many years.

It was urged by claimant that these lots would be especially desirable as they fronted on a State highway, had Oswego river at the back, were forty feet above the river and commanded a beautiful view across and beyond the river. All of these desirable features were present, but the reasonable market value of this property is not based upon the desirability alone but upon desirability plus probability, direction, speed and opportunity for city growth. There was a great deal of desirable land similarly situated in and about Oswego. The probable demand for lots would hardly warrant the estimate made by the claimant's witnesses as the then reasonable market value. Three thousand dollars would be a fair measure of the reasonable market value of the land as a whole at the time of the appropriation even if it were to be cut up into lots. All the lots, when sold, might total a larger sum, but the number of years that would probably elapse between the first and last sales of lots would, taken in connection with the tax charge and loss of interest, bring the market value of the property at the date of the appropriation to the figure named. An allowance for \$250 is made for the barn on the premises on the basis that the land was to be cut into lots and the barn sold and moved off or used in building a structure on one of the lots.

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JOSEPH CHRISTIAN v. STATE OF NEW YORK

No. 141-A

(Dated October 18, 1916)

Duty of the State to make inspection of ladders furnished for the use of its employees.

Joseph Christian, the claimant, was employed by the State at the Capitol in Albany. On June 24, 1910, under an order given him he was cleaning high windows in the Tax Commission's office. From a number of ladders he selected a light fourteen-foot step-ladder. He put up the ladder and went on the next step to the top, the step gave way, then several steps broke as he struck them until he fell through the ladder to the floor. He was severely bruised and was confined to his bed for two weeks and did not return to work until the latter part of July, 1910. On February twenty-eighth of the following year he was laid off with others when a change of administration occurred. His claim was for the direct results of the accident and also for premature senility due to his fall. The condition of the claimant at the time of the accident in 1916 was the same as in 1910, and obviously was the result of an arterial condition. Claim allowed as to the direct damages.

CLAIM against the State of New York for damages by an employee of the State at the Capitol in Albany.

Frederick H. Chew, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— On the 24th day of June, 1910, claimant was in the employ of the State, at the Capitol in Albany, as a cleaner. On that day the claimant was told to clean certain high windows in the Tax Commission's office. Claimant picked out from among a number of ladders a light fourteen-foot step-ladder. Claimant was on the ladder, on the next step to the top, when the step gave way, then several steps broke one after the other as he struck them until he fell through the ladder to the floor. He received severe

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bruises to the back, chest, right hip, and a bump on the back of the head. He was confined to his bed for two weeks and was away from work about a month. He returned to work in the latter part of July, 1910, and worked until February 28, 1911, at which time he was laid off with others when a change in the State administration occurred. He has been working since in a newspaper office sweeping floors and dusting.

The ladder in question was fourteen feet long; the stringers were one inch by one and one-half inch spruce; two stringers on each side; steps, spruce, seven and one-half inches wide and three-quarters of an inch thick; a three-inch by six-inch piece was nailed between the two stringers at each step and the end of each step was sunk into this piece to the depth of one-eighth of an inch. There were no iron tie braces running from one side to the other of the ladder to hold the ends of these steps into the one-eighth inch dadoes. This ladder, with the steps so placed, and nailed into the end with two small six-penny nails was not of the proper construction to use while washing high windows. The constant use of the ladder, so constructed, weakened it and made it unsafe. It was unsafe at the time of the accident to the claimant. The State did not provide him with a safe place in which to work.

There is a direct conflict of testimony between claimant and the cleaning boss, Gibbons, as to what was said by each to the other just prior to the accident and at the time claimant was standing on one of the top steps of the ladder cleaning the window in question. Gibbons testified he went up to the claimant saying "Joe, it is dangerous to use so high a step-ladder to wash windows." He stated that Joe replied: "I like the step-ladder better because it doesn't hurt my feet like rungs."

If Gibbons felt it his duty to warn claimant about the weakness of the step-ladder it was his duty to tell claimant to stop using it. This ladder was made to be used at any distance up to fourteen feet. It was the duty of the State to see that it was proper for the purposes for which it was being used. It was only natural for a man whose duty required him to stand on a step

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ladder or a rung ladder for considerable stretches of time to prefer a wide, flat step to a narrow, round rung. The ladder had been used for the same purpose right along and the State was charged with the duty of keeping it safe. Deeper dadoes and a few iron cross-rod braces would have made the ladder safe. These precautions should have been taken by the State. *Cummings v. Kenny*, 97 App. Div. 114; *Stewart v. Ferguson*, 164 N. Y. 553; *Burke v. State*, 64 Misc. Rep. 558.

It was the duty of the State to make inspection of its ladders and keep them in repair and in safe condition. *Corbett v. N. Y. C. & H. R. R. Co.*, 151 App. Div. 159. In *Shovan v. Lozier Motor Co.*, 158 App. Div. 487, we find that an employee had a right to assume that the spurs on the ladder had been sharpened and that the ladder was safe. That is going even farther than this case for the dullness of the spurs was observable while the defective condition of the step-ladder might not be observable except on the inspection of one accustomed to making inspections or otherwise qualified to do so.

While the accident was caused by the State's negligence and there is no evidence of any negligence on the part of the claimant, still there seems to be some doubt as to whether or not the claimant's condition in 1915 was due to his fall in 1910. No bones were broken. He was in bed only two weeks. He was at work again in four weeks and stayed until the following February, when he was laid off when there was a change in the State administration. He has been working ever since. There is a direct and positive conflict of medical testimony. Claimant's physicians testified that his condition in 1910 and at the time of the trial in 1916 was the same, was premature senility, was a permanent condition and was due to the accident. They acknowledged on cross-examination that the condition might be due to arterio-sclerosis. The State's experts swore that arterio-sclerosis was never due to traumatism. Claimant's physicians testified that his condition in 1916 was the same as in 1910 and that they examined him right after the accident in 1910 and then found his symptoms of body tremors, and so forth, which his

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physicians state might be due to arterio-sclerosis. Upon their theory, this condition must have occurred right after his fall from the ladder. If he was in such a condition immediately after the fall it is certainly as reasonable to hold that his condition was then due to some prior and continuing cause rather than to the fall itself. Under such circumstances a finding in claimant's favor on this point cannot be made. The State, however, should pay claimant the damages which he showed were the direct results of this accident. Those damages have been placed at \$450 and findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

MARY E. BROWNLOW v. STATE OF NEW YORK

No. 2515-A

(Dated October 18, 1916)

Liability of the State where an excavation created by the State substantially adjoins a public way.

The State armory in the city of Elmira, N. Y., has a sidewalk which extends from curb to building line, in front of the main central doorway, but on one side of the central entrance is a stairway leading down into the basement of the armory, the staircase going down next to and parallel with the front of the armory. On March 23, 1915, at a time when a great crowd was blocking the walks about the armory and the building adjoining it, which was the city hall, caused by the arrest of a man charged with the murder of the chief of police and of the detective sergeant of the city, the claimant, an elderly woman, was on her way home and, in attempting to get to the edge of the crowd, which was blocking the way, came to the beginning of the stairway, fell into the excavation and was severely injured. The case presents three distinct questions. *First*, did the stairway make the use of the highway dangerous? *Second*, was the dangerous nature of a staircase so excavated and constructed that such an accident might have been expected to occur and therefore to be guarded against? *Third*, was the claimant negligent? The court found as to all these questions favorably to the contention of the claimant. Claim allowed.

CLAIM against the State of New York for injuries caused by negligence.

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Knapp & Marlowe, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

FENNELL, J.—The claimant was injured on State property in front of the State armory in the city of Elmira, N. Y., on the 23d day of March, 1916, between 7:30 and 8 o'clock P. M. The claimant at the time of the accident was fifty-seven years of age and was engaged, on her own separate account, with her son, in the insurance business, and lived with her husband and son in the city of Elmira, N. Y.

On March 23, 1915, between 7:30 and 8 o'clock P. M. she was walking westerly in front of the State armory on the north side of East Church street in said city. A large crowd had collected in front of the city hall and the armory, following the arrest of the murderer of the chief of police and the detective sergeant of the city. The city hall is the next building east of the armory. The murderer was then in a cell in the city hall. The crowd grew so large and menacing the local militia company was called out to help preserve order. A police patrol driveway separates the city hall from the armory. The sidewalk in front of the city hall extends from curb to building and is very wide. The sidewalk in front of the armory, next west, does not extend to the building except in front of the main central front doors which lead on to the street. In the space in front of the armory, between the police patrol driveway and the main entrance, and some five feet northerly from the north edge of the sidewalk, is a stairway leading down into the basement of the armory. This stairway is about three and one-half feet wide, six feet deep and ten feet long, the long way of the opening being east and west and parallel with the front of the building. The building forms the north wall of the opening. Nine steps lead downward from the east toward the west. The south side and west end of the opening were protected by an iron rail, the north side was closed by the building itself, the east end or upstairs end was open. Claimant while proceeding westerly along the north side of Church street,

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and endeavoring to get past the crowd, kept to her right close to the south wall of the city hall. She crossed the driveway and proceeded directly westerly and close to the south wall of the armory, still trying to make her way around the edge of the crowd. She walked directly into the unprotected opening at the east end of the stairway and fell to the bottom of the stairs. Her injuries were severe and she was confined to her bed for five or six weeks and to her house for five months. There was a separation of the cartilage from the second rib and sternum on the right side, her right ankle was twisted, strained and weakened. She suffered from shock immediately after the accident and suffered pain for many months thereafter. An "X-ray" photograph taken two weeks after the accident, showed no broken bones in chest or ankle. At the time of the trial, eleven months after the accident, claimant's ankle was still weak and she was still lame.

This case presents three questions. *First*, did the stairway make the use of the highway dangerous? *Second*, should the State have foreseen that such an accident might reasonably have been expected to happen and therefore be guarded against? *Third*, was claimant negligent?

It was held by this court in *Carroll v. State*, 133 N. Y. Supp. 274, former Presiding Justice Rodenbeck writing the opinion, that if the excavation be "substantially adjoining the way" the liability attaches.

The sidewalk in front of the city hall extended from curb to building. The open space in front of the armory extended from curb to building. It is true the sidewalk did not cover this whole space. However, the size and layout of the city hall walk, of the armory walk, and the city hall and armory facades making the same line, the walks and the adjacent open spaces being on the same level, all taken together gave the appearance, under the conditions of night time and the large crowd, of an open public highway and sidewalk. It would seem that the opening was not only "substantially adjoining the way" but, under the circumstances, was in what was, apparently, a part of the way.

Second. The State not only should but actually did foresee that an accident might happen because of the nearness of the

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stairway to the stone sidewalk. The State protected the stairway on the west end and south side by an iron railing. On the north side the building itself formed the protection. Foreseeing the dangerous condition that might arise if a crowd large or small collected in front of the armory and moved about watching the soldiers, or some other crowd-gathering attraction, an iron railing had been placed on two of the remaining three open sides of the stairway. If it was considered necessary to have a railing on the west and south it was just as necessary on the east — the only difference being that while the drop into the opening from the west or south would be a sheer one of six feet the drop from the east would be just as far but not sheer — being down nine steps. The danger of falling in was the same from the east as from the west but the results of a fall from the west would probably be more serious — being a sheer drop. The place was recognized as dangerous and steps taken to reduce the danger but the final step of installing a small movable gate, iron bar or chain at the east end was not taken.

Third. The claimant was not negligent. She passed along the sidewalk close to the wall of the City Hall on the inside of the walk going substantially straight ahead and passing through the outskirts of the crowd. She was warranted in assuming because of the apparent continuity of the facades, same ground level, the absence of barriers, the presence of so many people all about, filling the street and the sidewalk from curb to building, that the fair passageway she had just come over was a continuous one on ahead of her — all the surrounding conditions being so nearly identical.

With so large a crowd present the street lamps, at the distance away they were, would throw shadows of the crowd across the opening of the stairway and tend to obscure it rather than to light it. The light from the windows of the armory being directly over but some distance above the opening would also tend to throw a shadow across the top of the opening.

Under all the circumstances it would seem that the claimant was exercising a reasonable care as she passed along, but that the

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State left part of its duty undone when it protected two sides of the three sides of the dangerous stairway and left the third side entirely unprotected and unguarded — particularly when protection would have been obtained by placing a light movable rail, gate or chain three and one-half feet long across the open end. The claimant should recover her damages from the State and findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

GEORGE C. KILTS and LUCRETIA KILTS, his Wife, v. STATE OF
NEW YORK

No. 413-A

(Dated October 18, 1916)

Damages to agricultural land in town of Vienna, Oneida county, caused by action of the State in turning a stream away from claimant's farm.

In the town above named the claimants owned a farm of some eighty acres on one side of Wood creek. The State cut off this stream from claimants' premises by turning the creek in the Barge canal for a feeder. Formerly the creek overflowed claimants' farm once a year with the result that a fertilizing silt flowed over the land. The cutting off of the creek stopped this process seriously affecting the market value of the farm. An award was granted.

CLAIM against the State of New York for damages resulting from appropriation by the State of Wood creek and turning it away from claimants' farm.

Davies, Johnson & Wilkinson, for claimants.

Egburt E. Woodbury, Attorney-General (Harry W. Ehle, Deputy Attorney-General), for State.

FENNELL, J.— In this claim the claimants were in possession of and owned a farm of eighty acres in the town of Vienna, county

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of Oneida. Wood creek bordered on the farm for 425 rods or about one and one-third miles. There are several "Wood creeks" which have been interfered with more or less in canal construction. This particular Wood creek was the old water way between the Hudson water shed and Lake Ontario water shed, being a passageway for canoes and boats from the Mohawk river into Oneida lake and through Oneida lake, Oneida outlet and Oswego river into Lake Ontario. It was and is a substantial running stream. The State, in the construction of the Barge canal, cut off this creek from the premises in question by turning the creek into the Barge canal for a feeder. Wood creek overflowed claimants' farm each year depositing a fertilizing silt on the farm. The cutting off of the creek stopped this annual fertilization and also deprived the farm of a substantial running stream which was valuable to the farm for the use of the stock thereon.

The State set up in defense that Wood creek carried the sewage of the city of Rome and that therefore it had no value as a watering place for stock. This latter contention is not well founded. It is true that Wood creek is now being used, as it has been for a great many years, for carrying the sewage of the city of Rome but the evidence shows that an injunction order was granted restraining the city of Rome from sewerage into Wood creek. The operation of such order has been stayed and extensions of time granted on the filing of releases given by the farmers who owned land along the creek, pending the time when the city of Rome will erect a sewage disposal plant. It is generally and well known in that locality that the city of Rome is and has been taking steps looking toward the establishment of a sewage disposal plant. Wood creek, carrying the sewage of the city of Rome would be of no value to this farm for stock watering purposes and the cutting off of the creek would not damage the farm in that respect if Wood creek were to continue indefinitely as an open sewer.

While the market value of the farm is and has been affected by the sewerage into Wood creek still the general knowledge that it would soon be free from sewage and be running in its natural manner prevented a very great depreciation in the values of lands

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along the creek, particularly as the city of Rome is paying the owners of lands along the creek for the privilege of sewerage into the creek past their lands. When the sewerage into the creek is stopped and the creek gets back to its normal condition it would be a valuable asset to this farm for stock watering purposes. The State has permanently taken away the creek not only in its present condition as a sewage carrier but in its following condition which will be its natural condition. The present use of the creek for sewerage purposes, while it has some bearing on the present value of the adjacent lands, does not materially mitigate the damage to this farm caused by the permanent taking of the entire flow of the stream.

The stream formed a natural cattle barrier across that entire end of the farm. The water being taken from the stream will require the owner to fence his farm. All these elements of damage are taken into account in the award filed herewith.

Paris and Webb, JJ., concur.

EMMA B. PARK v. STATE OF NEW YORK

No. 643-A

(Dated October 18, 1916)

Damages resulting from action of the State in interfering with the natural channel of the Chemung river and flooding plaintiff's farm.

The claimant is the owner of a farm on the Chemung river near the city of Corning. The State erected a dyke on the south side of the river and subsequently extended this dyke downstream and partly across the river end of claimant's farm of ninety-six acres. These changes allowed flood waters of the Chemung river to flow over claimant's land creating a gravel island or bar which extended gradually from time to time and depreciated the value of claimant's land.

CLAIM against the State of New York for damages resulting from erection of a dyke by the State in the Chemung river and

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changing the current with the result of creating a gravel bar to the injury of claimant's land.

Stanchfield, Lovell, Falck & Sayles, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

FENNELL, J.—Under authority of chapter 705 of the Laws of 1892 a dyke was erected along the south side of the Chemung river in the city of Corning and to the west boundary of the farm next west of the claimant's property. Under authority of chapter 221 of the Laws of 1895 the State extended this dyke downstream and partly across the river end of claimant's farm, which farm consisted of ninety-six acres. The statute directed that the dyke should extend across the lands of Robert F. Park "to the high bank there existing." Some distance downstream from the end of the dyke, as built, there is a high bank at the mouth of a small tributary stream.

The Chemung river, draining a mountainous section of southwestern New York and northwestern Pennsylvania, has periods of very high water every year. In such periods of high water the river is swift, roily and carries quantities of silt; it also, at such times, moves quantities of gravel from place to place.

The south bank of the river at claimant's farm and the upstream farms was high enough to restrain the high waters except in the heavy fall and spring floods. In these floods the water came over the normal bank and spread out over the large, low flat lands back of the normal bank and to the higher lands beyond. The dyke, being erected on the top of the normal bank, restrained these floods to the river channel, thus raising the water in the channel and causing it to run more swiftly. This had a tendency to, and did, pile up and create a gravel island or bar at a point below the end of the dyke where the flood water extended out over the low lands and lost some of its speed and carrying capacity.

A low wide slope extended along the south bank of the river

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along claimant's property and between the normal bank and the low water edge of the stream. This slope was from 75 to 100 feet wide and was covered with willows, thickets and some large trees. The top of the normal bank was covered with large old trees.

The gradual accretion of the island below the end of the dyke caused a gradual change of current in the river. The bank on the north side of the river being high the water crowded towards the south bank and slowly cut away the low slope, later the normal bank and finally tillable land beyond. The cutting away amounted to twelve and six-tenths acres up to October, 1915. The cutting of the high bank commenced in 1901 and reached nine and seven-tenths acres by January, 1912, an average for ten years of about one acre per year. From January, 1912, to October, 1915, two and nine-tenths acres were cut off, a little less than an acre per year. The notice of intention having been filed March 15, 1912, the damages since October 15, 1911, can be considered. The total cutting in that period from October, 1911, to February, 1916, was five acres. The depreciation in the fair market value of the claimant's farm caused by the cutting away of the land between October, 1911, and the time of the trial amounted to \$1,500.

The downstream portion of the farm, beyond the end of the dyke, about thirty-five acres in extent, was subjected to considerable current when the water was very high, due to the rapid spreading of the flood water below the end of the dyke. This current tends to wash away the top soil if the flood happens to occur when the fields are plowed. Because of this condition this part of the farm was turned into a meadow and finally into a pasture some years ago.

There are two questions in this case.

Did the State interfere with the natural channel and flow of the river and by faulty design or construction of the dyke cause damage to the claimant? What is the amount of such damage?

The erection of the dyke, in the very erection of it, proves it was an interference with the flow of the river and an altering of its natural channel. That was the purpose of its construction.

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The restriction of the river to the new channel, created by the high bank on the north side of the river and the dyke in question on the south side, raised the elevation of water in the new channel and compelled a faster flow in proportion to the narrowing and deepening of the channel as compared with the cross section flowage area under the conditions prior to the change. Straightening, narrowing or deepening channels of running streams causes them to scour out on the bottom,—while the widening of the same streams will permit the scoured material to accumulate on the bottom in proportion to the widening and slowing of the current. This was the condition brought about by the erection of the dyke and the ending of it in the middle of a field instead of against a bank. Ending the dyke in this manner was an improper and faulty design, as placed, considering the purposes for which the dyke was built and the probable results of so ending it. The statute, under authority of which it was constructed, sets forth what would have been a proper design as far as ending is concerned. Across the lands of Robert F. Park “to the high bank there existing.”

Did this condition damage claimant? Naturally the accumulation of dirt and gravel on the bottom grew into an island and turned the stream toward the bank. The bank has been cutting away at the rate of about an acre a year. Prior to the building of the dyke the normal bank was about seven feet high, and below that, and between it and the low water, or summer stage, was a strip 75 to 100 feet wide running the length of the river frontage of the farm. The lower strip was covered with willows and some large trees while the top of the normal bank was covered with large old trees. The presence of these large old trees showed a natural, substantial and undisturbed normal bank of at least several generations. Surely some obstruction is interfering with the natural flow when the cutting has taken away the lower slope, the bank with its large trees and the field beyond at the rate of an acre a year. The restriction of the flood waters between the north bank and this dyke on the south bank, causing a swifter and deeper stream, coupled with the open space at the end and

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beyond the end of the dyke, caused a condition somewhat similar to a hydraulic dredge in operation,—moving material by water under pressure and restriction, and then depositing the material by eliminating the restriction.

Claimant's contention that thirty-five acres of the downstream portion of his farm is subject to swift currents when the river is at high flood due to the ending of the dyke in the middle of the flat fields seems logical and is supported by proof. This current running over a plowed field, would be so damaging to the land, by removing the top or fertile portion of the soil, that the claimant has given up tilling the land there and is using it for pasture. This is good judgment on his part and also tends to reduce the damages which might reasonably be expected to result if the land was plowed and tilled.

The measure of damage to claimant because of the cutting off of his land by the river is the depreciation in the fair market value of his farm between October 15, 1911, and the date of the trial. In addition the claimant is entitled to the annual rental value of the said thirty-five acre piece less the rental value for the purposes for which it can now reasonably be used, in the course of good husbandry, being subject to such a current. The balance of claimant's farm, forty acres in extent, was flooded by backwater. This backwater condition was present before the dyke was constructed and no award is made for any damage for such backwater flooding.

The State may or may not have owed a duty to build the dyke, but, having built it, the State must assume any damages arising from a failure to build it properly.

Findings have been made accordingly.

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ANDREW L. FRANCE v. STATE OF NEW YORK

No. 320-A

(Dated October 18, 1916)

Where a canal lift-bridge begins to go up just as a person has driven upon it with a horse and covered wagon, it is not negligent for him to attempt to get off.

The claimant, on November 6, 1911, while driving a horse and covered wagon, started to cross a lift-bridge over the Erie canal on North Salina street, in Syracuse. The bridge started to rise after he was upon it. He decided to get across the bridge, but when he reached the other end it was already two feet up in the air. The horse jumped off the bridge, pulled the wagon after him and tipped it over, throwing claimant through the top of the wagon. As a result claimant was severely injured about the face and head. The horse was injured and the wagon was rendered valueless. *Held*, that the decision on the part of the claimant to attempt to get off the bridge rather than to continue being raised up into the air with the horse and wagon was justifiable, and that he was not properly warned of the intended raising of the bridge; that it was through the negligence of the State's employees that he was permitted to get on the bridge. Claim allowed as to direct injuries and as to property loss; disallowed as to chronic condition alleged to have resulted from the effects of the blow on the head.

CLAIM against the State of New York for damages caused by negligence.

Miller & Matterson, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.—On November 6, 1911, at about 10:30 A. M., claimant was driving south on North Salina street in Syracuse and approached the bridge where that street crosses the Erie canal. He was driving a covered wagon containing teas and coffees. Claimant drove on to the bridge and was on his way across the same when it started to rise. He hurried to get across the bridge but when he reached the southerly edge the bridge was

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up about two feet. The horse jumped off the bridge, pulling the wagon after him. The wagon was tipped over throwing claimant through the top of the wagon.

The horse was laid up for four weeks during which time claimant had to hire another horse, for which he paid one dollar and fifty cents a day, which was a reasonable figure. The market value of the horse before the accident was one hundred and twenty-five dollars, and its market value after the accident was seventy-five dollars. The market value of the wagon was twenty-five dollars and after the accident it had no value.

Claimant's forehead was gashed about two and one-half inches; his left nostril was torn; there was a hole through his upper lip; a small cut over his right eye; back strained; and he received a severe bump on top of his head.

It seems reasonably clear, from the evidence, that the claimant was not properly warned that the bridge was to be raised, and that he was allowed to get on the bridge through the negligence of the State's employees, which employees were charged with the duty of protecting the public when the bridge was being raised. Having gotten on the bridge and finding that the bridge was about to go up, the claimant was warranted in trying to get off the bridge as soon as possible and not take the chance of remaining high up in the air with his horse and wagon until the bridge was lowered. When he had gotten almost to the edge of the bridge, and it was found to be up two feet, his horse became unmanageable and jumped from the bridge. Under such circumstances he was not charged with the same duty as though he had plenty of time to think and decide upon the best course.

There is no question that the claimant received some very severe cuts and bruises, particularly the bump on the head as he was thrown through the top of his wagon as it pitched forward and fell off the bridge. It is contended that the blow on the head produced chronic pachymeningitis and that the claimant has been suffering from that for a long time due to this injury. Examinations of claimant and his symptoms, made by experts on the day of the trial, were the basis of entirely divergent opinions. Experts for the claimant concluded that he had chronic pachy-

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meningitis and that it was caused by the accident. Experts for the State testified that he showed no objective signs or symptoms of pachymeningitis and that his main subjective symptom was pain in the head. It was also found that his blood pressure was 230 and that he had some enlargement of the heart and some hardening of the arteries. The State's experts testified that the examination showed no faulty reflexes of patellas or of the eyes, and that the shape of his head was normal and no bump was observable.

It would seem that if the claimant had been suffering from chronic pachymeningitis since the time of the injury, a period of four years, that well-qualified experts should be able to determine that fact. From the evidence of the experts we feel that we would not be warranted in making a finding that claimant was suffering from chronic pachymeningitis at the time of the trial.

Nor can we agree that his extraordinarily high blood pressure was due to the accident.

Paris, J., concurs.

Ordered accordingly.

MOHAWK VALLEY CANNING COMPANY v. STATE OF NEW YORK
No. 10437

(Dated October 25, 1916)

The appropriation by the State of lands from which the larger part of supplies of raw material used by a canning factory was produced does not make the State liable in damages.

The claimant was engaged in the canning business and owned one and five-tenths acres of land on which stood the cannery building. In creating Delta lake as a supply for the Barge canal the State appropriated about four and one-third square miles of land. The appropriation line is within seven feet of claimant's buildings but at the highest water level would be thirty-two feet from some of the buildings. Claimant alleges a damage of \$12,006.85 that being almost the entire value of the plant. Ultimately claimant abandoned the plant alleging that it had been made useless for their business. *Held*, that in taking so large an area of land from which claimant's raw material came the State was no more bound to pay

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claimant than a private purchaser would have been; that claimant could not recover for loss on buildings or machinery because if it could not continue in business it was bound to dispose of the machinery and to dismantle or make some other use of the buildings and this it had failed to do. Certain items of claim allowed.

CLAIM against the State of New York for damages to claimant's canning factory by appropriation of lands to form part of Delta lake.

Mason & Harrington (Timothy Curtin of counsel), for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, Deputy Attorney-General), for State.

Per Curiam — Claimant company owned a cannery with land south and north of the cannery buildings. The State of New York appropriated about four and one-third square miles of land which lands were flooded by the building of the Delta dam. This dam impounds waters known as Delta lake for the purpose of supplying the Barge canal. The lands flooded by Delta lake were rich fertile low lands, were immediately adjacent to claimant's cannery and from which low lands, as testified by one of claimant's witnesses, the claimant obtained four-fifths of its raw material. The appropriation line runs on the easterly, southerly and most of the westerly side of the lot on which the cannery buildings stand. At one place the appropriation line is within seven feet of some of the buildings and with a five-foot head over the crest of the dam the flow line will be twenty-five feet inside the appropriation line or at the stage of highest water would be thirty-two feet from some of the buildings. At the time of the trial the water had not been within one hundred and fifty feet of the buildings.

It was testified upon the trial on behalf of the claimant that the entire property was worth \$12,613.85 and that the salvage value of some of the machinery was \$607 making a net damage of \$12,006.85. Claimant owned one and nine-tenths acres of land. The area appropriated was one and one hundred and twenty-six

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thousandths of an acre. The area remaining to claimant was seven hundred and seventy-four thousandths of an acre.

Claimant's witnesses testified that the remaining land and buildings had no value after the appropriation and the only salvage was \$607 on certain machinery and the the one and nine-tenths acres of land had a reasonable market value of \$1,000.

Claimant used the lot south of its cannery, which lot was one and one hundred and twenty-six thousandths acres in extent, for unloading and storage purposes during the canning season. The cannery was arranged and equipped to handle raw material from the south toward the north into the buildings.

Claimant asks damages for substantially the entire value of the plant claiming that the taking of the one and one hundred and twenty-six thousandths acres of storage room on the south of the cannery and leaving only the seven hundred and seventy-four thousandths acres on the north of the plant left claimant without sufficient storage room and also left it on the wrong side of the plant with respect to the equipment for carrying, also claiming that the water being brought so near the cannery had a bad effect on the business, causing the cans to become rusty, etc.; also that the State in flooding the area from which four-fifths of the raw material used in its cannery was produced actually shut off four-fifths of the supply and thereby made the cannery useless and ruined the business. The two judges signing this award have gone upon the lands in question and into all the buildings and carefully examined the whole situation thereabouts and based upon the evidence of the case and that inspection we are of the opinion that the one and one hundred and twenty-six thousandths acres taken were of the reasonable market value of \$200 an acre; that the cost of rearranging the machinery to handle the raw material from the north side of the cannery instead of the south side would have been \$1,500; that the cost of tile-draining and leveling off the land to the north of the buildings to make the same suitable for the purpose for which the land south of the buildings had been used before the appropriation would have been \$500.

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We are not convinced that the claimant's contention that the blowing of the winds across the lake would rust the cans sufficiently to injure the business of the claimant has a sound basis in fact. The testimony shows that the Olney & Floyd Canning Company's plant was and is in operation about a mile from the claimant's plant on the bank of the same Delta lake and only three hundred feet from the flow line. We cannot agree with claimant's contention that the State in taking so large an area of land from which claimant's raw material came took anything away from the claimant for which the State is in duty bound to pay claimant. Had the same area of land been bought by a private individual and turned into a great grazing pasture or even into a park the claimant would have been injured in exactly the same manner but would have had no right of action against the owners in fee using their property for grazing purposes or a park instead of producing raw material for claimant's cannery. Of course it is a hardship on claimant that its cannery happened to be located on the side of this fertile basin but as these facts would hardly establish liability against an individual or a corporation we do not see how we have authority to make any award against the State for this damage which claimant had undoubtedly suffered. For the reasons above stated we have not included as an element of damage in the award given in this claim either the bringing of the waters of the lake near the buildings of the cannery nor the taking of the four and one-third square miles of territory in the immediate neighborhood from which territory the claimant drew four-fifths of its raw material.

No allowance is made in the award to claimant for any loss on buildings or machinery. The appropriation was made November 10, 1909,—the claim was filed February 27, 1911, was heard in April, 1915, and viewed by the court in the summer of 1915 and during all this time the machinery stayed in the buildings, becoming rusty and going to pieces.

It has now become practically useless. If the claimant could not continue in business either because of the act of the State or any other reason it was its bounden duty to dispose of the

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machinery in the buildings at the best figure possible and to dismantle or make such other use of the buildings as economy of material and building could warrant. Claimant cannot let the cannery stand idle and the buildings and machinery depreciate until the whole are practically useless and then with justice ask the State to pay practically the full value of the machinery and buildings even if the State's acts were responsible for the closing of the cannery and the State was legally liable to pay the damages flowing therefrom. Claimant herein has not taken the reasonable and proper steps to reduce the damages which flowed from the stopping of its cannery operations and the abandoning of its property. It is not necessary to estimate herein what if any salvage should have been made at or immediately after the time of the appropriation as it is the opinion of the court, as stated above, that the State is not legally liable to the claimant for the stopping of its business and the abandoning of its canning plant.

CLARA EMERSON v. STATE OF NEW YORK

No. 2221-A

(Dated October 27, 1916)

A "severe shaking up" caused by the falling of a canal bridge while claimant was crossing it in a light motor car cannot be said to have caused the growth of an ovarian tumor.

The claimant, on August 11, 1913, while passing over Main street bridge at Boonville, N. Y., where the bridge crosses the Black river canal, and, while she was guiding the car, collided with a suspension rod. The car became jammed behind the rod, but with the assistance of several persons the machine was pulled back, straightened around, the engine cranked, and the claimant and her two companions got back into the machine. Just as the car started forward again across the bridge the bridge settled slowly at one corner. The State claimed that the collision with the suspension rod was the cause of the falling of the bridge, but against this contention is the fact that the bridge started to fall from the other end. The bridge had been condemned as unsecure by several officials of the State, and the State was held to be clearly negligent in

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permitting the use of the bridge under the conditions complained of. *Held*, that claimant was not guilty of contributory negligence, but that, while she must have received a "severe shaking up," there was no evidence that the condition of the claimant, as shown by an operation which she underwent in November, 1914, showing among other things a malignant growth or tumor on one of the ovaries, could have been the result of the falling of the bridge in question. Claim not allowed as to injuries of the ovarian region.

CLAIM against the State of New York for damages caused by negligence.

Clarence R. Sperry, T. Harvey Ferris and C. R. Dewey, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.—On August 11, 1913, at about 2 P. M. claimant was injured by the falling of Main street bridge over the Black River canal at Boonville, N. Y. Claimant was driving a Ford automobile weighing about 1,550 pounds. She occupied the right front seat; a Mr. Loren the left front seat and a little boy was in the back seat.

The highway in question, known as State route 27, is the main traveled route between the Adirondack section and the main east and west highway across the State passing through Utica. Near the bridge the direction of the highway is substantially northwest and southeast, whereas, the bridge itself crosses the canal substantially northeast and southwest, making a sharp almost right-angled reverse curve in passing onto and across the bridge from either direction. Claimant was progressing along the highway in a southeasterly direction. Turning to the northeast onto the bridge her car swung over to the right side of the bridge and struck the planks near the right side which run lengthwise on top of the flooring of the bridge. Claimant turned the car sharply to the left, which turn carried her across to the left side of the bridge, and a front wheel became jammed behind a suspension rod. Several people came to her assistance and the machine was pulled back, straightened around, the engine cranked and she and her two companions got back into the machine. She raced the engine

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to see if it was in working order and had started the car forward across the bridge when the bridge structure settled slowly at one corner. Claimant, to avoid tipping over, turned the car "head on" in the direction of the settling. When the bridge struck the edge of the canal bank and stopped, part of the bridge was on the bank and part in the canal. The car was right side up, tipped sharply forward and directly against the right side of the bridge at its lowest part as it lay collapsed. The other three corners of the bridge remained substantially in place.

Claimant was thrown forward against the wheel and back against the seat. She received serious bruises about her abdomen and back. She was carried to a local hotel and was under a doctor's care for several days.

Claimant was thirty-three years old at the time of the accident and had been an actress for fourteen years. She consulted different physicians at various times and places subsequent to the accident and finally on November 16, 1914, underwent an operation. Her left kidney was found to be enlarged and two inches lower than normal. There was a sarcoma on the left ovary about the size of an egg; infiltration of the oviducts; local adhesions and a small quantity of ascites. The surgeon sutured the kidney to the abdominal wall, removed both ovaries and a large part of the uterus and fallopian tubes.

The evidence in this case shows that the bridge was not sufficient for the demands of the locality and that the State had actual notice of that condition. On February 21, 1912, Hon. D. W. Peck, Superintendent of Public Works, charged as such with the duty of maintaining and operating the canals and canal bridges, wrote Hon. George H. Whitney, chairman of the ways and means committee of the Assembly, a letter regarding the bridge, in which he stated: "The bridge now existing at this point was built many years ago and in spite of the efforts heretofore made by the department to make repairs to render it safe, is in poor condition. At the present time warning signs that no two vehicles may be on the bridge at the same time, have been posted. The bridge is located on the main traveled highway leading to Rome. On account of its condition it is not fit for the

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needs of travel at that point. The bill providing for a new bridge has my approval."

On March 13, 1912, the Superintendent of Public Works sent a letter to Governor Dix regarding this bridge which contained the following: "I am familiar with the condition of the existing structure and know that it is not safe for the heavy and constant traffic to which it is now subjected. There is no doubt in my mind but that a new bridge at this place is necessary."

The bridge was of the Whipple arch type and was too old and too light for heavy automobiles and trucks. Some of these trucks, when loaded with crushed stone for State roads, weighed eight tons. The State had actual notice of the inadequacy of the bridge. Provision was made by chapter 53 of the Laws of 1912 to build a new bridge. Fifteen months elapsed. The old bridge gave way to the damage of this claimant. Clearly the State was negligent in permitting the use of the bridge under such circumstances.

The claimant was not guilty of negligence contributing to the accident or to her injuries. Her course when she first came onto the bridge was erratic, particularly at the time her car ran into the suspension rod. However, at the time of the actual falling of the bridge, her car was in a proper place with claimant at the wheel and nothing was done by her at that time to cause the bridge to give way and settle down. It was contended by counsel for the State that the collision of claimant's auto with the suspension rod was a contributing cause to the accident. The manner of the settling of the bridge and the fact that it did not commence to settle at that point show that contention unfounded.

From the very nature of the accident the claimant must have received a severe shaking up, but the evidence shows that she got out of the car alone; that she was attended by a physician twice upon the day she was injured and three times afterwards; that she rehearsed during the week following the accident and that the next time she consulted a physician was November 21st, which was a month and ten days after the accident. The surgeon who operated on claimant, and who was sworn on the trial on behalf of the claimant, testified on cross-examination that this sort of sarcoma or tumor was caused in about one case in a thousand

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by trauma. The surgeon sworn by the State testified that sarcoma was a malignant tumor; that sarcoma of the ovary is questionably due to a blow; that the ovary is suspended like a bell in the pelvic cavity and could not receive a blow direct and that traumatic sarcoma is found on organs that receive a blow direct. He also testified that sarcoma cannot be shown to be due to trauma and can only be shown by the history of the patient, and that there is no scientific proof of such origin; that one person in ten had a history of trauma who has sarcoma. It can hardly be held, under such circumstances, that the claimant has established that the sarcoma of the ovary was caused by a blow received in the accident in question.

Findings have been made accordingly.

Paris, J., concurs.

Ordered accordingly.

WILLIAM BALLINGER SMITH *v.* STATE OF NEW YORK

No. 13903

(Dated November 1, 1916)

Claim based upon circumstances similar to that of *Marian Davies v. State of New York* herein reported as No. 2290-A.

The claimant is the owner of lands under water in what was known as the stub end of the Mohawk river at the city of Utica. Award made upon doctrine laid down in the case of *Williams v. City of Utica*, 217 N. Y. 162.

CLAIM against the State of New York for farm lands belonging to claimant appropriated by the State near the city of Utica.

Theodore L. Cross, for claimant.

Egburt E. Woodbury, Attorney-General (Frank K. Cook, and Michael H. Quirk, Deputy Attorneys-General), for State.

FENNELL, J.—The property described in this claim lay in the bed of the old channel of the Mohawk river, in the stub end of

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the old channel left by a river straightening, and was covered with water. The opinion in the Marian Davies case covers this case, except, in this case, all the land taken was in the old bed of the Mohawk river.

It is understood that the property described in this claim as being in the old bed of the Mohawk is a portion of the Cosby Manor grant, so called, which grant was passed upon in the case of Williams v. City of Utica, 217 N. Y. 162, and the award in this claim as to the land in the old bed of the Mohawk is made upon that basis.

JOHN I. MUNRO v. STATE OF NEW YORK

No. 2803-A

(Dated December 6, 1916)

There is no liability on the part of a charitable or eleemosynary institution for personal injuries resulting from the negligence of an employee.

In 1909, John I. Munro while employed as a fireman at the Kings Park State Hospital at Kings Park, Suffolk county, N. Y., and in doing various other sorts of work about the institution, had occasion in the course of his duties to pass close by some fifteen or twenty insane patients in front of the hospital on the public highway at work assigned to them. Several guards were with them; as claimant passed by one of the insane men struck him on the side of the head with a spade, knocking him down. Claimant has never recovered from the injury resulting from this blow. He has sclerosis of the brain and is totally incapacitated from doing any work and cannot even care for himself. He will never be better. At the time of the injury he was receiving the pay of sixty-two dollars per month and also outside of his State hours earned from twenty-five to forty dollars per month working for individuals. The State paid him monthly payments of a total of \$3,716. In 1915 the Legislature passed an act making this a valid claim against the State and referring it to this court for determination. Upon all the facts, *held* that claimant's injuries amounted to \$25,000; an award was made at that figure less the amount already paid him by the State.

CLAIM against the State of New York for personal injuries resulting from a blow inflicted upon claimant by an inmate of a State hospital.

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Baylis & Sanborn, for claimant.

Egburt E. Woodbury, Attorney-General (Harry P. Nevins, Deputy Attorney-General), for State.

ACKERSON, P. J.— The claimant herein, John I. Munro, when thirty-one years of age, with a wife and two children, was employed as a fireman by the State of New York at the Kings Park State Hospital at Kings Park, N. Y., in the county of Suffolk. He was receiving a salary of sixty-two dollars per month, and while he was employed as a fireman he did various kinds of work about the institution, and at the time of his injury was doing electrical work. He was a bright strong man who had never been sick and who was earning from twenty-five to forty dollars per month by doing work for other people when he was not on duty at the hospital. On the 27th day of September, 1909, he was outside the hospital grounds looking after some electric wires across the highway in front of the hospital. Two attendants at that time had fifteen or twenty insane inmates there in front of the hospital on the public highway at work. As Munro went by them, without any warning whatever and without anything being said by anybody, one of those insane inmates by the name of Sabilski struck Munro on the side of the head with a spade or shovel, knocking him to the ground. He has never recovered from the injury caused by this blow, and the testimony in the case is that he never will. The evidence shows that he is suffering from pachy-meningitis or sclerosis of the brain, and that he is totally incapacitated from doing any work. He can neither control his body nor mind, and is in such a physical and mental state that he never can do any work and cannot even take care of himself.

From the time he was injured up to October 1, 1915, he received monthly payments from the State amounting in all to \$3,716. In May, 1915, the Legislature passed an act, which was approved by the Governor, whereby the damage suffered by the claimant by reason of the assault as aforesaid by said insane

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inmate was made a valid and legal claim against the State and the same was referred to this court for determination.

The court has heard the evidence offered by the claimant to support his claim, pursuant to this act of the Legislature, and finds that he was damaged as a result of this injury in the sum of \$25,000.

The learned Attorney-General contends that this act of the Legislature is unconstitutional, because it revives a legal claim that has been barred by the general Statute of Limitations, in violation of article VII, section 6, of the Constitution. We cannot agree with the learned Attorney-General in this contention. The proposition seems to be well established that the claimant had no cause of action against the State until the same was created by statute. There is no liability on the part of a "charitable or eleemosynary institution supported wholly or in part by the State or a municipality for personal injuries sustained through the negligence or misconduct of an agent or servant of the institution. The authorities refuse to apply the doctrine of *respondent superior* in such cases, and base the nonliability on the theory that the functions of such institutions are governmental in character and if the funds appropriated for their maintenance are used to pay damages recovered in actions for personal injuries, the purpose and usefulness of the institutions would be wholly or in part defeated." 4 L. R. A. (N. S.) 269; *Martin v. State*, 120 App. Div. 633; 105 N. Y. Supp. 540; *Garland v. New York Zoological Society*, 135 App. Div. 163; *Woodhull v. Mayor*, 150 N. Y. 450; *Smith v. State*, 169 App. Div. 438.

The doctrine as laid down by these authorities clearly establishes the proposition that Munro had no cause of action against the State until the same was created by statute. The statute was enacted by the Legislature under and by virtue of the power which it possesses to validate and provide for the payment of illegal private claims if they are supported by a moral obligation and founded upon justice. *Wheeler v. State of New York*, 190 N. Y. 406.

However, if we should on the other hand accept the theory of the State that the claim of the claimant herein was based upon

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the negligence of State employees for whose acts the State is liable, it does not appear from the evidence that even in such a view of the case the claim would be barred by the lapse of time. The payments which the State has made to the claimant each month from the time of the injury up to October 1, 1915, was a recognition of the State's obligation and liability to the claimant, and would have been sufficient, as between citizens of the State, to take the claim outside of the Statute of Limitation and prevent its being barred by lapse of time.

And so we contend that either upon the theory of the State as regards this case or upon the theory of the claimant's attorneys and the Legislature which passed the act in question, the claimant would be entitled to recover. We prefer, however, to accept the view of claimant's attorneys and the Legislature that the claimant had no cause of action against the State until the same was created by the act above referred to, because such contention seems to be founded upon good reasoning and abundant authority.

Inasmuch as the claimant not only has been ruined for life but has been placed in such a situation that he will always be a care to his friends, we believe that the damages which he has suffered fairly and reasonably amount to the sum of \$25,000, and that an award should be made for that amount less the sums which the State has paid him since the date of his injury.

MALVINA BEEMAN v. STATE OF NEW YORK

No. 2530-A

(Dated December 7, 1916)

Where the State authorities knew that a canal bridge was unsafe for loads weighing more than two and one-half tons and allowed it to remain in that condition over six years, persons riding in auto busses over such bridge, without proper notice of defects, are not guilty of negligence.

The claimant, Malvina Beeman, was injured in April, 1915, by the collapsing of a bridge over the Erie canal on the State highway between Schenectady and Rotterdam Junction. The claimant boarded an auto

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bus at Schenectady which made regular trips between Schenectady and Rotterdam and return, paid her fare and became a passenger on the said bus. About five miles west of Schenectady where the highway passes over an Erie canal bridge at what is known as Van Slyke's bridge, and while the auto was on the bridge, the latter collapsed, dropping the bus and the occupants down about twenty feet to the canal bed. Claimant was a woman of middle age, a housewife, living with her family. She suffered a fractured skull and other injuries. *Held*, that the State knew or ought to have known of the condition of this bridge and that claimant was not chargeable with negligence in not ascertaining its dangerous nature; that a notice that the bridge was not safe for more than two and one-half tons cannot be taken as a prohibition to use the bridge for more than that weight. Claim allowed.

CLAIM against the State of New York for injuries sustained while passing over an Erie canal bridge on a State highway.

Rockwood & McKelvey, for claimant.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— Claimant was injured in April, 1915, by falling off a bridge over the Erie canal on the State highway between Schenectady and Rotterdam Junction. An auto bus made regular trips between Schenectady and Rotterdam and return. A number of people boarded this auto bus at Schenectady, among them being claimant. She paid her fare and became a passenger on the auto bus. It then proceeded on its way toward Rotterdam, along the one main highway, which is also a State highway, between that place and Schenectady. About five miles west of Schenectady the highway passes over an Erie canal bridge, known as Van Slyke's bridge. This bridge was of the Whipple type,—the usual type of canal bridges. It had a span of about seventy feet. The arches or compression members of each truss were formed of eight by twelve-inch white pine timbers. The tops of each arch consisted of a long horizontal member supported at each end by end pieces which ran diagonally downward to the edge of the embankment. Some distance in from the toe of each arch two other diagonals ran up to the top member, and between

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the tops of these latter diagonals extended another white pine timber. This construction made the middle part of the upper member of the arch of double thickness. The toe of the diagonal end piece where it rested on the embankment was fitted into an iron block. Tension rods passed from one iron toe block to the other iron toe block of the same truss on the other embankment of the canal. The bridge was built in 1902. Various repairs had been made to the bridge from time to time, but none of the main compression members consisting of the diagonal end pieces and the top chords had ever been repaired or renewed.

As the auto bus was passing on to the bridge the bridge suddenly collapsed carrying the bus and occupants down about twenty feet to the canal bed.

On May 26, 1909, six years before the accident, James Scanlon, section superintendent, had sign boards made and put up near each end of the bridge. These sign boards were fourteen inches high, thirty-six inches long, were painted white and the letters forming the notice were black. At the time of the accident one of the signs remained near the Rotterdam end of the bridge but there is no proof that the sign board at the Schenectady end was in place at that time. The notice on the sign boards was the usual notice signed by the Superintendent of Public Works that loads of more than two and one-half tons were forbidden to cross the bridge.

There are two vital questions in this case.

First. Was the bridge in a dangerous condition and did the State know, or should it have known, of that condition?

Second. Was the claimant guilty of contributory negligence in using the bridge as a passenger in an auto bus while such sign or signs were posted near the bridge?

After the bridge had fallen portions of the compression members were sawed off and were presented as evidence in court on the trial. It was plainly apparent that while the outside of these members looked to be in fairly good condition, due to their being kept painted, many of them were in fact merely shells. Some portions of these compression members produced in court, including the diagonal end pieces, were so rotten inside that witnesses in

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the presence of the court easily pulled them apart and crumbled them in their fingers. The court gave a very close inspection to the pieces of timber in evidence. From the actual rotten condition of these timbers it seems incomprehensible that the bridge stayed up in place at all. What kept it here, unless it was the force of habit or the grace of God, remains a mystery. It was testified by bridge experts on the trial that bridges will stand a very heavy load at one moment and shortly after fall under a much lighter load. In a case recently decided by this court a heavy auto truck loaded with crushed stone passed across the canal bridge at Boonville, and a few minutes later the bridge went down under a light Ford automobile. There is no question in the mind of the court that this bridge was not only unsafe for a two and one-half ton load but was unsafe for any load. This condition could have been discovered by a proper test. No such test was ever made.

Auto bus service between Schenectady and Rotterdam had been in operation for several years. The bus which fell into the canal and its predecessor had been making the round trip several times a day for several years. There were three bridges between Schenectady and Rotterdam and claimant may or may not have read these warning notices. She had been traveling over this road and bridge in an auto bus for several years. The warning signs had been up some six years. Claimant had passed over the bridge in this forty passenger auto bus several times a week for several years and to all appearances the bridge would hold much more than two and one-half tons for she had been many, many times a part of a load much heavier than two and one-half tons which had gone safely over the bridge. Whatever the form of the notice, the fact that traffic was not actually stopped over the bridge, gave the notice the character of a warning of its not being safe for more than two and one-half tons and cannot be taken as a prohibition to use the bridge for more than two and one-half tons.

The outside of the timbers being apparently firm and hard and heavy loads passing and repassing many times a day over this bridge during a number of years would lead those using the

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bridge to believe that it was safe for a much heavier load than two and one-half tons. If the Superintendent of Public Works knew or had reason to believe that the bridge was not safe for loads weighing more than two and one-half tons it was his duty to have a test made and find out what was the actual condition of the bridge. If found to be in a dangerous condition for two and one-half tons or any other usual load which might be expected to pass over such a bridge in such a place, he should cause to be put up sufficient signs to attract the attention of all persons who might desire to use the bridge, and then, within a reasonable time, make such repairs, changes, or replacements as would make the bridge a proper bridge for the traffic to be accommodated at that locality at that time. If the State authorities who caused these warning signs to be placed at these bridges knew that the bridges were unsafe for loads of more than two and one-half tons, and still permitted the bridges to continue in that condition for six years, it would seem that such a procedure was in fact an attempt to provide a defense of contributory negligence in some future litigation, if such a bridge should fall, instead of providing a safe substantial bridge as demanded by the traffic at that place.

Families from all over America are touring the State highways of New York State all summer long. They are passing over these canal bridges along our great central State highways. They are entitled to have a dangerous bridge properly so noticed or barricaded. Small sign boards placed over to one side of the road and left there for five years do not constitute the kind of protection to which the citizens of this and other States are entitled when they are passing over bridges built, owned and maintained by the State of New York.

It is difficult to determine just how far the auto bus had gotten onto the bridge when it fell. Most of the witnesses testified to three or four feet. Mrs. Olive King stated she was on the fourth seat from the front and that the bridge fell just as she got onto it. Photographs showing the auto bus standing right side up in the bed of the canal and entirely clear of the abutment, would indicate that it had gotten pretty well onto the bridge when it fell. This latter is a deduction and while reasonably strong

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can hardly be taken as conclusive proof against a large number of witnesses, even if most of them, having been passengers, are interested in the event of this litigation. The bridge timbers were so rotten that the bridge might well have started to fall as soon as any appreciable load, particularly a moving load, started over it.

The claimant, a married woman living with her family and doing the housework, was severely injured. She suffered a fractured skull, had teeth knocked out, received a large deep tear in the forearm and other injuries. An award has been made to her in the sum of \$3,500.

LANELLE M. SHEARMAN v. STATE OF NEW YORK -

No. 2647-A

THOMAS A. SHEARMAN v. STATE OF NEW YORK

No. 2648-A

(Dated December 21, 1916)

The skidding of an automobile on a sidehill stretch of State highway which was being repaired by a contractor under contract with the State and which skidding resulted in injuries to the claimants was in part due to the negligence of the State.

On the Pompey-Jamesville highway, No. 669, is a hillside stretch known as Barrows Hill just north of the hamlet of Pompey, Onondaga county. The highway was maintained by the State. On May 14, 1915, the State entered into a contract for the repair of this road by the application thereto of a specified top-coating containing oil and small stone. When properly done this top-coating formed a dry surface. On this particular hill stretch, however, the oil was so applied as to flood portions of the road bed and the claimants going over it on July 30, 1915, were injured by the skidding and turning over of the car in which they were. Under the circumstances which are set forth in the opinion an award was made to Lanelle M. Shearman, who was in the car with her young child, but the claim of Thomas A. Shearman was not allowed, these findings being based upon the negligence of the State, but in the case of Thomas A. Shearman it being found that he was guilty as driver of the car of contributory negligence. Both of these claims grew out of the same accident and are discussed together in the opinion.

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CLAIM against the State of New York resulting from injuries received on a State high road which was being negligently repaired by a contractor for the State.

Clayton R. Lusk and John Shay, for claimants.

Egburt E. Woodbury, Attorney-General (Henry P. Nevins, Deputy Attorney-General), for State.

FENNELL, J.— These two claims grew out of the same accident and are discussed together in this opinion.

On July 30, 1915, claimant was injured in an automobile accident which occurred on that portion of the Pompey-Jamesville highway, No. 669, known as Barrows Hill, about one and one-quarter miles north of the hamlet of Pompey in the county of Onondaga. Said highway was maintained by the State under the patrol system. On May 14, 1915, a contract was let by the State of New York to Dana W. Robins, Inc., providing for the repair of sections of certain highways including the one above mentioned. This repairing was in fact a top-coating of oil and stone in the proportion of one-fourth of a gallon of oil and eighteen pounds of stone to the square yard. This proportion would make the oil one-twenty-second of an inch thick (the thickness of a ten-cent piece) and the stone about one-fourth of an inch thick.

In doing the work on Barrows Hill the westerly side of the road was oiled first and stone scattered over it; then the easterly side was oiled next and stone scattered over it. There was a greater proportion of oil placed on the easterly side than was called for in the specifications and contract. This disproportion was so great on certain portions of the easterly side of the macadam on Barrows Hill that it produced a slippery and dangerous condition.

Claimants were starting out in an automobile trip in a six-cylinder roadster, weighing about 3,500 pounds. Claimant Lanelle M. Shearman was holding their only child, about three years of age, in her lap. Proceeding northerly from their home in Cortland they came onto the road which was being resurfaced with oil and stone and passed along over same to Barrows Hill. The car was

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proceeding at the rate of about twenty miles an hour when it started down Barrows Hill. On Barrows Hill the highway consists of a macadam road in the center with a dirt roadway or shoulder on each side. On the easterly side — being the downhill traffic side — the dirt next to the macadam was worn away, leaving a groove next to the macadam varying from three and one-half to five and one-half inches deep and also varying in width. This groove was worn by the drivers of loaded wagons driving with one wheel off the macadam and in the edge of the dirt as a help in holding back the wagon on the hill, and also as an additional way of breaking by cramping the front wheel of a loaded wagon against the stone edge or shoulder.

Just after the car started down Barrows Hill the hind wheels slipped on the oily surface and slewed to the right and off the macadam part of the road; the right front wheel also went off the macadam. Claimant Thomas A. Shearman swung the front of the car to the right and this brought the four wheels of the car on to the dirt shoulder of the road. The machine was in high gear. Mr. Shearman then turned the front wheels of the car to the left and put on more gas. The left front wheel got in the groove mentioned and crowded against the stone edge of the macadam portion of the highway. The car proceeded down the hill, which hill has a 7 per cent grade, with his left front wheel so grinding against the stone shoulder for a short distance when, suddenly, the left front tire was torn from the wheel and the machine started to the left and diagonally downward across the road, the left front iron rim cutting a groove in the macadam portion of the road. The back end of the car slewed to the right on the oily surface of the easterly side of the road and the car continued in this way until near the westerly side of the macadam it rolled over and finally stopped, right side up pointed up the hill near the bank which formed the westerly edge of the dirt shoulder on the westerly side of the road.

Claimants were severely injured. Their only child which Mrs. Shearman was holding on her lap was uninjured. At the time of the accident claimant, Mrs. Lanelle M. Shearman, was thirty-two years of age, was five feet seven and one-half inches tall, weighed

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about 150 pounds, had had no previous injuries and was in good physical condition. Her injuries due to the accident were as follows: left wrist sprained; contusion left elbow; contusion left hand; contusion left side forehead and temple; contusion right leg between knee and ankle; seven-inch cut on left leg; wound on instep; fracture of the coccyx; fracture of the eleventh rib on the left side; fracture transverse process first and second lumbar vertebra; fracture of the left ramus of the ischium and consequent overlapping of one-half inch; dislocation of the sacro-iliac joint about one-half to three-quarters of an inch, thus tipping the pelvic bones and making the left leg one-half and three-fourths of an inch shorter than the right and causing a curvature of the spine. The fractures, dislocations and curvature mentioned were shown by X-ray plates. The shortening of the leg and curvature of the spine are permanent. Claimant suffered very severe pain for a long time. She struck the road or was struck by the rolling car with such great force across the lower portion of her back that three blood tumors formed and had to be drained. In attempting to walk she fell a number of times. The nerves which control the muscles of her left leg pass out through the opening which was made smaller and deformed by the fracture of the ischium.

The injuries of claimant Thomas A. Shearman consisted of a broken nose, leaving a permanent scar on top of nose; sternum-clavicular dislocation; fracture and crushing in of sternum; concussion of brain; fracture of skull; injury to muscles of back and neck; many contusions and lacerations, some of which were filled with dirt and oil, all of which produced a severe nervous shock.

The evidence in this case shows that the easterly side of the macadam portion of the road on Barrows Hill had much too large a percentage of oil to the amount of stone used; also that the oil and stone placed on the road on the same highway to the south of Barrows Hill produced a firm dry surface. Mr. Shearman driving over this newly placed oil and stone to the south of Barrows Hill and finding it hard and good wheeling naturally expected the remainder of the same road, being resurfaced at the same time, to be in substantially the same condition. Of course the State had the right to oil the entire macadam portion of the highway and

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put no stone in it, in which case the driver of an auto could see his danger all the time. The condition of the resurfaced macadam south of Barrows Hill led the claimant into a theretofore undisclosed dangerous place, especially going down a hill with a 7 per cent grade. Had the road on Barrows Hill been in the same condition as the road to the south thereof the speed of about twenty miles an hour might not have been at all excessive. When the auto slewed off the macadam onto the dirt portion of the road Mr. Shearman and his family were put in a dangerous position. The principle of law that a party who places another in peril cannot complain if he does not exercise the best judgment in extricating himself from such peril (*Voak v. N. C. R. R. Co.*, 75 N. Y. 320) is not quite applicable to this case. It is true the negligence of the State placed the occupants of the Shearman car in a dangerous position, and if he was forced by the then circumstances to make a quick choice of alternative dangerous courses he would not be held necessarily to the best choice. But in this case when the rear wheels slewed off the macadam and he turned the left front wheel also onto the dirt shoulder the reasonable thing for him to have done was to put on his brakes, get into low gear and then back on the macadam if he chose, proceeding with care down the 7 per cent grade. He had come over some miles of resurfaced road and found it all right for normal speed or more, but he found from the sudden slewing of the car, it being a bright clear day, that there was a slippery oily condition. He had, therefore, reason to expect that there might be other oily slippery spots on the hill. He had his wife and their only child with him. Reasonable prudence would have dictated brakes and low gear. Had the auto been still on the slippery macadam the use of the brakes might have been bad judgment, but he was off the macadam and on the dry dirt shoulder. Mr. Shearman was not charged with notice of the sharp stone shoulder at the edge of the macadam. It was not such a shoulder that a high-powered car could not well get over, but his method of attempting to get over it was an improper one. The tearing off of the left front tire might have been due to a number of causes, the most probable being the application of more gas, meaning extra power, plus the weight of the car and occu-

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pants on the 7 per cent down grade, all making a diagonal drag across the left front tire as it was pushed against the sharp stone edge of the shoulder of the macadam and slipped along parallel with the shoulder and pressing powerfully against it. When the tire did finally rip off, the iron rim dug into the macadam and formed a sort of drag on the left front part of the car, causing the car to slew on the oil in an arc around this rim made line as a base, and finally the momentum of the car moving sidewise and meeting the resistance of the dry surface on the west side of the road, rolled over and stopped, right side up, pointing up the hill and near the westerly bank forming the westerly side of the road. It is difficult to say just how much the slippery condition of the roadway where the car got back on it again had to do with the final tipping over and consequent injuries. It certainly was a large causative factor. Whatever Mr. Shearman might have done thereafter to prevent the accident was absolutely cut off by the slewing around on the slippery surface and thus taking all control out of his hands. From that moment he was helpless.

The two phases of this accident — the slewing off the macadam and the slewing across the road after the car got back on again — while distinct, occurred in a very brief period of time, seconds at the most. The first slewing was caused directly by the negligence of the State. The second was the result of the State's negligence both in the original slewing and the slippery condition where the second slewing occurred, but Mr. Shearman was also negligent in putting on power and trying to push up over the shoulder without first putting on his brakes and getting into low gear. His contributory negligence bars his recovery.

Mr. Shearman's contributory negligence does not bar his wife's recovery. *Hoag v. N. Y. C. & H. R. R. R. Co.*, 11 N. Y. 199, and the decisions following are authority for the holding that his negligence cannot be imputed to her. They had traveled many miles together and she regarded him as a competent, careful driver. When the emergency arose she could not be required to seize the steering wheel or interfere with the driver. That would make matters worse. Besides her whole attention would and should be given to their child, about three years old. That she was giving

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her whole attention to the child may be concluded from the fact that she was holding the child in her lap and that while the child came through unhurt the mother was made a cripple for life.

It is contended that the work of oiling and stoning was the work of an independent contractor and not having been accepted by the State at the time of the accident, the State was relieved from liability. We cannot agree with this contention. The State cannot thus relieve itself from liability. The road remained in control of and under the jurisdiction of State authorities and was actually being inspected and patrolled by them while the work was in progress and, in addition, this road was at the time of the accident open for public travel. The case of *Turner v. City of Newburgh*, 109 N. Y. 301, would seem to be conclusive on this point.

While Mr. Shearman's injuries were very severe and, in addition, he had been put to a very large expense because of the injuries to his wife, himself and damages to his car, still we feel that his own negligence contributed toward the accident and his claim should be dismissed.

Without the State's negligence this accident would not have happened, and while Mr. Shearman's negligence bars his recovery his negligence cannot bar his wife's recovery. Her injuries, as above stated, were very serious, and her crippled condition will be permanent. We have made an award to her in the sum of \$9,000.

PUBLIC SERVICE COMMISSION

FIRST DISTRICT

**In the Matter of the Complaint of ALBERT MORITZ and Others
against the EDISON ELECTRIC ILLUMINATING COMPANY OF
BROOKLYN**

Case No. 1540

(Public Service Commission, First District, October 27, 1916)

Powers of Commission — rate regulation of electrical corporations — powers of investigation not limited to specific complaints.

Practice and procedure of Commission — notice of complaint against rates of electrical corporations — reasonable notice adequate.

Rate regulation — electrical corporations — determination of fair value of property a basis for rate making.

Valuation — electrical corporations — contingencies and imperfect inventory — allowance of over \$470,000.

Valuation — electrical corporations — engineering — allowance of 4.2 per cent adequate.

Valuation — electrical corporations — interest during construction.

Valuation — electrical corporations — land — present value for rate purposes.

Valuation — electrical corporations — accrued depreciation — straight line method.

Valuation — electrical corporations — overhead and development expenses not chargeable to capital if already charged to operation.

Valuation — electrical corporations — patent rights not valued for rate purposes.

Valuation — electrical corporations — franchise value not allowed for rate purposes.

Valuation — electrical corporations — cost of unifying system — no allowance for securities issued in excess of value of tangible property.

Valuation — electrical corporations — organization expenses of \$200,000 allowed.

Valuation — electrical corporations — going value — large average earnings.

Valuation — electrical corporations — total value of property.

Rate of return — electrical corporations — return of 7 per cent adequate.

Cost of service — electrical corporations — rate investigation expenses not applicable as normal operating charge.

Cost of service — electrical corporations — employees' profit-sharing fund — only permanent contributions chargeable to operation.

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Cost of service — electrical corporations — depreciation charges allowed on basis of accrued depreciation — straight line method of computation.

Rates and charges — electrical corporations — excessive profits justify rate reduction.

Rates and charges — electrical corporations — rates to cover cost of service.

Rate differentiation — electrical corporations — differentiation according to time and conditions of service not unjust discrimination.

Rates — electrical corporations — reduction of retail rates.

Rates — electrical corporations — maximum demand rates — method of determining maximum demand.

Rates and charges — electrical corporations — cost of lamp renewals — type of lamps to be supplied.

Rates and charges — electrical corporations — minimum charge of \$12 per year.

Rates — electrical corporations — flat rate not productive of profitable long hour consumption.

Rates — electrical corporations — retail rates excessive.

Rates — electrical corporations — differentiation of rates — small group rates to insure profit from every customer not desirable.

Rates — electrical corporations — wholesale rates — quantity rates to be superseded by maximum demand and hours use rates.

Rates — electrical corporations — maximum demand rates — method.

Rates — electrical corporations — high tension rates — quantity consumption rates for individual consumers to be abolished.

Rates — electrical corporations — revision of rates required — order entered.

Respondent's contention, at the close of the hearings, that, as the complaint was directed solely to the existing rate of twelve cents and the proposed rate of eleven cents per kilowatt hour, and notice of the hearing was limited thereto, the investigation should have been confined, under sections 71-72 of the Public Service Commissions Law, to the cause for such complaint, cannot be sustained in view of the provision in section 72 that the Commission "may consider all facts which in its judgment have any bearing upon a proper determination of the question *although not set forth in the complaint and not within the allegations contained therein*;" also because the complaint alleged discrimination in rates charged to different classes of consumers; and because proceedings herein are governed by section 66 of the Public Service Commissions Law, which gives the Commission broad powers of rate regulation.

Service upon the respondent of a complaint against its rates was reasonable notice that the Commission would exercise all the powers under the provisions of the statute pertinent thereto, and gave the respondent a reasonable opportunity to prepare its defense.

To ascertain the value of the physical property is the first step toward the determination of the ultimate question of "fair value" of the property for rate making purposes.

The largest item of difference in the valuation of the physical property of the Edison Electric Illuminating Company of Brooklyn was about

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\$649,000 under the head of contingencies and incomplete inventory, which appraised by the respondent's engineers to December 31, 1913, at \$1,119,224, and by the Commission's engineers at only \$470,388. *Held*, that, in view of the relative completeness of the record herein, the allowance for contingencies must be chiefly for imperfect inventory, and large allowances in other cases and circumstances do not justify, in view of the testimony herein, a departure from the allowance fixed by the Commission.

An allowance is made for engineering of 4.2 per cent on the appraised value of the physical property, including contingencies and incomplete inventory, against the contention of the respondent that the allowance should be 5.4 per cent.

In accordance with the practice of the Commission and decisions of the courts in the appraisal of physical property for capitalization and rate cases, deduction will be made for both physical and functional depreciation, computed by the straight line method, from the cost of reproduction new of the physical property. Where a generating station, which was constructed by one of the predecessor companies, is but little used, but the cost of additional facilities at the other station to duplicate the service is not determinable from the records, the entire value of the former will be allowed, but said allowance is not to be construed as a precedent that property in excess of reasonable needs for service is to be included in a valuation for rate purposes.

No allowance will be made for patent rights for which securities have been issued because, having a limited life, sound accounting requires that their cost should be amortized and because they no longer represent property used in the electrical service to the public. No deduction will be made from working capital for consumers' deposits because if no such deposits were received the respondent would have to supply an equivalent amount of capital on which it would be entitled to a return. Under the circumstances herein no addition will be made to working capital for unbilled current, because to do so would require a revision of the accounts, increasing the surplus of the respondent by the amount of said unbilled current and the revenues for the current year by the excess of the unbilled current for the current year over that of the preceding year.

Interest on land is not allowed in a rate case where the present value of land is used. Charges to capital of sums aggregating over \$4,000,000 for overhead and development expenses will not be allowed when it has been the practice of the respondent to charge them to operation in accordance with the accounting provisions of the Commission, and a different ruling would require a revision of the accounts and a transfer from operating charges to profits of an annual sum of about \$335,000, which would be sufficient to pay a fair rate of return on the entire capital charge in dispute.

In accordance with well established law, no allowance will be made for franchise value in a valuation of property for rate purposes. An allowance of over \$3,500,000 was claimed by the respondent for commissions and other expenses incident to the issuance of securities and for securities

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issued in excess of the value of tangible property acquired from predecessor companies. *Held*, that the only claim that can be made upon the public is for a fair return on property devoted to the public use and not on securities issued, that economy and efficiency resulting from the unification of the electrical system cannot be valued any more than advanced legislation which promotes the security of the investors, and that services in connection with organization and promotion will be considered under the head of organization expenses.

On the basis of the charges made on the books of the respondent and its predecessors, whose records have been found to be complete, an allowance will be made for organization expenses in the amount of \$200,000 out of a total of \$1,358,238 claimed by the company.

Where the average returns upon a fair valuation of the property throughout the history of the business exceeded 7 per cent and in fact amounted, as in the case herein, to 9 per cent upon the valuation, no deficiency in a fair rate of return exists to support a contention that an allowance for going value should be made.

The total value of the property of the Edison Electric Illuminating Company of Brooklyn is appraised for rate purposes as of January 1, 1916, at a round sum of \$22,000,000, which is more than the total capital provided by the investors, and comprises as follows: Cost of construction, material, labor, contingencies and engineering, \$26,269,594; interest during construction, \$305,000; deduction for accrued depreciation, \$7,140,000, leaving a net present value for physical property of \$19,434,594; land, \$1,160,000; working capital, \$1,000,000, and organization expenses, \$200,000, making a total of \$21,794,000.

It was contended on behalf of the respondent that 8 per cent should be allowed as the proper rate of return, and in support thereof it was testified that securities had been issued at prices making the average cost of money to the respondent's system about 6¼ per cent. It was adduced at the hearing, however, that this was an excessive cost of money, and was due to the fact that 8 per cent dividend paying stock and 6 per cent debentures were issued at par, although the market value was far above par, and that the mortgage bonds of the system were selling on a 5 per cent basis and the stock on a basis of less than 7 per cent. *Held*, that a 7 per cent return would be adequate to permit the payment of 5 per cent interest on bonds and 8 per cent dividends on stock to provide a sufficient reserve for surplus and contingencies. A reduction of rates, it was contended, would necessitate a reduction in the rate of dividends paid by the respondent. *Held*, that the obligations of the public must be based on the requirement of a fair return on fair value, not on the interest and dividends paid on an inflated capitalization.

Expenses of extraordinary character, including \$70,000 incurred in connection with the rate investigation, are not properly chargeable to operation to determine the normal cost of service.

An annual contribution of \$80,000 to an investment fund for the benefit of employees under a profit-sharing plan, which was formerly charged against surplus, will be permitted as an operating charge, provided said

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contribution will continue regardless of the effect of a revision of rates upon dividends.

The cost of operation will include an annual charge for depreciation based upon the finding of the Commission for accrued depreciation and computed on the straight line method, said charge being deemed sufficient for all purposes contemplated in the Commission's accounting regulations, "Account E 842, General Amortization Electric."

The profit during the years 1913, 1914 and 1915 having yielded net returns of 9.6 per cent, 10.9 per cent and 12.4 per cent, respectively, on the fair value of the property, and the income from electric operations in 1915 having been \$2,650,000, the consumers are entitled to a reduction in rates aggregating about \$1,150,000.

Rates should take account of expenses directly assignable to the individual consumer or to a special class of consumers, and incurred in connecting such consumers to the electrical system and rendering service to them.

Off-peak service may be rendered at lower rates because the additional fixed charges and operating expenses occasioned thereby are lower, and differentiation in rates according to varying conditions of service which involve varying costs, is not unjust discrimination.

It appeared that the average price paid by retail lighting customers exceeded three times the average price paid by wholesale customers. *Held*, that, if the prices paid by wholesale customers are remunerative, the rates imposed upon retail customers are excessive and should be reduced by more than \$1,150,000.

It appeared that the rates in force for retail lighting, based upon a maximum demand, was eleven cents for the first two hours', eight cents for the second two hours' and four cents for the excess over four hours' average daily use of maximum demand; that the maximum demand was assumed to be 50 per cent of the connected load for residences and 70 per cent for other premises; and that, in calculating the maximum demand, no installation was rated at less than one and one-half kilowatts. It appeared, moreover, that in most cases the maximum demand was less than one and one-half kilowatts capacity, that two-thirds of the respondent's meters had a capacity of only one and one-quarter kilowatts or less, and that the proper meter capacity was only 25 per cent of the maximum demand for residences and 60 per cent for commercial establishments, without deducting for losses in transmission. *Held*, that the existing method of determining maximum demand unjustly discriminates against retail customers and should be modified so that the maximum demand shall be computed upon a basis of 25 per cent of the connected load for residences and 50 per cent for other premises, with a minimum rating of 250 watts.

A charge of one-half cent per kilowatt hour of current used for lighting may be made for fifty watt standard tungsten lamps, which should be substituted for Gem lamps, and the charge for current should be separated from the charge for lamps, so that in the consumption of current for

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domestic appliances from lighting sockets no charge will be made for lamps if no lamps are used or if they are purchased by the consumer. Because certain consumer costs are almost the same for all customers and those using current an increasing number of hours do so at a decreasing production cost for each additional hour, a flat rate per kilowatt hour without regard either to quantity of current taken or number of hours used should not be established.

The practice of making a minimum charge of twelve dollars per year will be left undisturbed because mere connection with the consumer's premises involves certain expenses for maintaining the meter, indexing, billing, etc., regardless of the amount of current consumed.

The contention of the respondent that the retail rates are not excessive, and that under the existing maximum retail rate a large group of customers pay less than their cost of service, cannot be sustained in view of the unwarranted distribution among all customers of advertising and promotion expenses and loss on uncollectible bills, as well as in view of the charge made to retail customers of a return on the investment in, and the expense of, maintaining a large part of the mains, and if said items were excluded the customer cost of the maximum rate retail customers would be reduced 50 per cent and would yield sufficient revenue to pay all the direct consumer costs, plus a net revenue of six cents per kilowatt hour for operating charges and a fair rate of return, which is double the average price charged to wholesale low tension customers.

Differentiation of rates should be by large classes and not by small groups of consumers, and a maximum rate should be profitable on the class as a whole, but not so high as to insure a profit on every customer, particularly if a minimum charge is imposed to discourage unprofitable business.

Account being taken of the conditions of service so as to give the long-hour consumers the benefit of a lower rate, the Edison Electric Illuminating Company of Brooklyn is directed to establish a schedule of rates, excluding the installation or renewal of lamps, as follows: Eight cents for the first two hours' average daily use per month, six cents for the second two hours' average daily use per month and four cents for the excess over four hours' average daily use per month; said schedule to apply to public as well as private buildings. The maximum retail rate for power should be reduced from ten cents for the first twenty-five hours' monthly use of the maximum demand to eight cents; the rate of five cents for the second twenty-five hours' monthly use of the maximum demand and three cents for the excess over fifty hours' monthly use of the maximum demand should remain unchanged, except that quantity discounts on bills under the three-cent rate should be abolished, as they result in unjust discrimination.

The existing "Wholesale" Rate and Rate "B," under which charges vary according to quantity of current used, should be abolished, as well as the discounts on bills under the maximum demand rate, and a single maximum demand and hours use rate schedule should be substituted,

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which will take account of the consumer's load factor in its relation to the company's peak.

Multiplicity of high tension rates for individual consumers, based on quantity of current consumed, should be replaced by rate schedules applicable to classes and conditions of service.

An order will be entered, effective December 1, 1916, for a term of one year, directing the Edison Electric Illuminating Company of Brooklyn to revise its rates for electric current as in the order provided.

This proceeding was commenced by the adoption of a resolution on July 16, 1912, directing a hearing upon the complaint of Albert Moritz and more than 100 other consumers against the rates of the Edison Electric Illuminating Company of Brooklyn. While the hearings were in progress an appraisal was made by the Commission of the company's property and the records were carefully examined for the purpose of arriving at a valuation, which was finally fixed by the Commission as of January 1, 1916, at \$22,000,000 as against \$38,822,411 claimed by the company.

On October 27, 1916, the Commission entered an order, pursuant to an opinion of Commissioner Hayward, which is set out in full below, reducing the rate for current from eleven cents to eight cents per kilowatt hour. The order was as follows:

"A hearing having been had upon the complaint, dated June 10, 1912, of Albert Moritz and more than 100 other customers of the Edison Electric Illuminating Company of Brooklyn before Hon. Milo R. Maltbie, Commissioner, beginning July 30, 1912, and continuing before Hon. William Hayward, Commissioner, on and after April 13, 1915, Albert Moritz and others appearing in behalf of the complainants, Samuel F. Moran, Ashley T. Cole and others appearing as counsel for said company, and Henry H. Whitman, Assistant Counsel to the Commission, attending, and the Commission having made an investigation to enable it to ascertain the facts requisite to the exercise of the powers conferred upon it, it is

"I. Ordered that on and after December 1, 1916, and for a period of twelve months thereafter the maximum price to be charged by said Edison Electric Illuminating Company of Brook-

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lyn for electric service, exclusive of the installation and renewals of electric lamps, shall be eight cents per kilowatt hour.

“II. The Commission being of opinion after said hearing and said investigation that the rates or charges of said company are unjust, unreasonable, unjustly discriminatory and unduly preferential, it is

“Further ordered that on and after December 1, 1916, and for a period of twelve months thereafter said rates or charges shall be as follows:

“1. Eight cents for the first two hours' average daily use of the maximum demand; six cents for the second two hours' average daily use of the maximum demand; and four cents for the excess over four hours' average daily use of the maximum demand. Said maximum demand, except when determined by meter, shall be calculated as not in excess of 25 per cent of the consumers' connected load in the case of residence customers, and not in excess of 50 per cent of the connected load for other consumers, provided, however, that said maximum demand shall not in any case be assumed to be less than 250 watts.

“2. The maximum price to be charged for installation and renewal of incandescent lamps furnished by said company in connection with the supply of current for lighting under any lamp service agreement shall be one-half of one cent per kilowatt hour. Said lamps shall be tungsten lamps of standard efficiency and ratings, or other lamps of like or greater efficiency and ratings. Said company shall not furnish to its customers Gem lamps, or other lamps of an efficiency of less than one and one-quarter watts per candle power. If tungsten lamps of smaller capacity than fifty watts are furnished by said company it shall be entitled to make an extra charge therefor but not more than the additional cost of the installation and renewal of such smaller lamps.

“3. No discount shall be allowed by said company under its maximum demand power rate.

“III. Further ordered that on or before November 15, 1916, said company shall issue, file and post a schedule or supplement to carry into effect the provisions of this order.

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" IV. Further ordered that on or before December 1, 1916, said company shall submit for the approval of the Commission a complete tariff for all electrical service effective December 1, 1916, which tariff shall be in accordance with the provisions of this order and the decision in this case.

" V. Further ordered that this order shall take effect forthwith and shall continue in force until changed or abrogated.

" VI. Further ordered that on or before November 10, 1916, said company shall notify the Commission whether this order is accepted and will be obeyed."

H. H. Whitman, for Commission.

Albert Moritz, complainant, in person.

Hatch & Sheehan, by Ashley T. Cole and Samuel F. Moran, for The Edison Electric Illuminating Co. of Brooklyn.

HAYWARD, Commissioner.

THE PROCEEDING

This proceeding was commenced on July 16, 1912, upon a petition of more than 100 customers of the Edison Electric Illuminating Company of Brooklyn, dated June 10, 1912, alleging:

" I. That the prices of electricity sold and delivered in the borough of Brooklyn, in the city of New York, by the Edison Electric Illuminating Company of Brooklyn, under its general rate of twelve cents, or its proposed rate of eleven cents, are unjust, unreasonable and excessive, and are disproportionate to the proper cost of manufacturing and delivering such electricity in said borough.

" II. That the differences in price of such electricity so sold and delivered under the general rate and the prices charged to numerous preferred customers are unreasonable, and such differences unjustly discriminate against the smaller consumers and give undue preference to the larger consumers."

The hearings in the proceeding were begun on July 30, 1912,

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before Commissioner Maltbie, and were continued before me on April 13, 1915, and on subsequent dates. Briefs were submitted on behalf of the complainants and defendant, the final brief of the complainants being filed on July 6, 1916.

In order to ascertain the fair value of the property upon which the company is entitled to earn a fair return, the Commission's engineers, acting in co-operation with engineers employed by the company, appraised the company's property, and the company's records were also examined by the Commission's accountants and engineers. A voluminous record, containing more than 3,000 typewritten pages of testimony and 400 exhibits, was thus made.

RATES

On January 1, 1905, just prior to the appointment of a joint legislative committee to investigate the rates for gas and electricity in Greater New York, the Edison Company reduced its maximum price for electricity from twenty cents to fifteen cents per kilowatt hour. Following the investigation the Legislature that same year reduced the maximum price to twelve cents per kilowatt hour for purposes other than street lighting. Laws of 1905, chaps. 732 and 733. On July 1, 1912, the Edison Company reduced the maximum price to eleven cents, which is the present rate (except twelve cents in the case of prepayment meters), with a graduated scale of prices for larger consumers.

The present rate system of the Edison Company is elaborate and complex. The maximum price is eleven cents per kilowatt hour. Nevertheless, service is furnished to certain consumers at less than two cents per kilowatt hour for low tension current and about one cent for high tension current. Between these extremes the prices paid by different classes of consumers vary widely. Thus retail customers pay on the average nine cents per kilowatt hour for lighting but less than five cents for current used for power purposes. Large consumers, however, obtain low tension current for lighting and power at an average price of less than three cents per kilowatt hour, and a very important group pay less than two cents.

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SCOPE OF THE PROCEEDING

After all the parties to the proceeding had rested, counsel for the company raised a technical objection with regard to the scope of this proceeding. It is contended that, as the complaint was directed solely to the general rate of twelve cents and the proposed rate of eleven cents, the Commission had jurisdiction under section 71 of the Public Service Commissions Law only to "investigate as to the cause for *such* complaint," and not to investigate as to the reasonableness of any other rates charged by the company, and that, as the notice of hearing in this case was limited to the complaint in this proceeding, the company had not been given proper notice of any other charges and, therefore, no other questions may be considered.

The rate-making powers of the Commission may be exercised under two general heads. Sections 71 and 72 read in part as follows:

"Upon the complaint in writing * * * of not less than one hundred customers or purchasers of * * * electricity * * * as to * * * the efficiency of the electric incandescent lamp supply, the voltage of the current supplied for light, heat or power, or price of electricity sold and delivered * * * the proper commission shall investigate as to the cause for such complaint * * *.

"Before proceedings under a complaint presented as provided in section seventy-one, the commission shall cause notice of such complaint, and the purpose thereof, to be served upon the person or corporation affected thereby. Such person or corporation shall have an opportunity to be heard in respect to the matters complained of at a time and place to be specified in such notice. An investigation may be instituted by the commission as to any matter of which complaint may be made, as provided in section seventy-one of this chapter, *or* to enable it to ascertain the facts requisite to the exercise of *any power* conferred upon it. After a hearing and after such an investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maxi-

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maximum price of gas or electricity * * * for the service to be furnished. * * * In determining the price to be charged for gas or electricity the commission may consider *all facts* which in its judgment have any bearing upon a proper determination of the question *although not set forth in the complaint and not within the allegations contained therein* * * *.”

Section 66 reads in part as follows:

“* * * * Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the rates or charges or the acts or regulations of any such person, corporation or municipality are unjust, unreasonable, unjustly discriminatory or unduly preferential or in anywise in violation of any provision of law, the commission shall determine and prescribe the just and reasonable rates and charges thereafter to be in force for the service to be furnished notwithstanding that a higher rate or charge has heretofore been authorized by statute, and the just and reasonable acts and regulations to be done and observed * * *.”

The complaint in these proceedings refers not merely to the maximum rate, but also to the differences in price of electricity under the general rate and the prices charged to numerous preferred customers. The complaint alleges not only that the maximum rate is too high, but that there is discrimination in the rates charged to different classes of consumers. These proceedings, therefore, come under section 66 as well as sections 71 and 72. There can be little doubt that the company in having served upon it the petition of the complainants had adequate notice of the intent of the Commission to examine into the rate schedules and rate practices of the company. The record contains a full statement of the rate schedules of the company, and the sales and revenue under each of them.

The company can claim no more than “reasonable notice” and “reasonable opportunity” “to prepare its defense or objection to the demands of the Commission.” *Matter of Village of Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123. When the complaint and notice of hearing were served upon the company,

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it was charged with notice that the Commission would exercise all powers and take all necessary action under the pertinent provisions of the statute.

CORPORATE HISTORY AND INTERCORPORATE RELATIONS

The Edison Electric Illuminating Company of Brooklyn, the respondent in this proceeding, is the operating company for a system which has a monopoly of the electric business in the entire borough of Brooklyn, with the exception of the twenty-ninth ward, commonly known as Flatbush. The company was incorporated on March 9, 1887, and obtained its franchise on November 3, 1888, to construct and operate an underground system for the supply of electric current for illumination and power covering the then city of Brooklyn, the area within the present wards 1 to 28 of the borough of Brooklyn, or about 40 per cent of the area of that borough. On October 30, 1899, the company absorbed through merger the Citizens Electric Illuminating Company of Brooklyn and the Municipal Electric Light Company, companies which had franchises to establish and operate overhead systems for electric lighting in certain wards of the city of Brooklyn. On April 4, 1900, the Edison Company also absorbed through merger the Bergen Beach Light and Power Company. It also controls by stock ownership the Amsterdam Electric Light, Heat and Power Company, which succeeded through purchase under foreclosure on November 10, 1897, to the rights and property of the State Electric Light and Power Company, and which had a franchise to supply current by an underground system in the borough of Brooklyn but ceased to operate in 1901.

The Edison Company is in turn controlled by the Kings County Electric Light and Power Company, which was incorporated in 1890, and which was granted a franchise on June 23, 1894, to construct and operate an underground system to supply current for electric light, heat and power in the borough of Brooklyn. The stock of the Edison Company is owned by the Kings County Company and is pledged under a mortgage as security for the payment of ninety-nine year 6 per cent bonds of the par value of

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\$5,176,000 issued by the Kings County Company in exchange for the stock of the Edison Company of the par value of \$5,000,000.

On October 30, 1899, the Kings County Company leased its property and franchises for a period of thirty-eight years to the Edison Company. The Edison Company is now the operating company and the Kings County Company the holding and financial company, advancing money as needed to the Edison Company on notes or open account. Under the lease, the Edison Company must use its net annual profits from the operation of its own and the leased property, after paying all taxes and assessments on the latter, for the payment of interest on the Kings County 6 per cent purchase money bonds issued for the Edison stock and the 5 per cent first mortgage bonds secured by the Kings County Company's plant; the remainder of the profits which would otherwise be applicable to dividends on Edison stock is to be turned over to the Kings County Company.

CAPITALIZATION AND INVESTMENT

The Edison system had outstanding on January 1, 1916, in the hands of the public a total capitalization of \$27,709,000. If to this there be added the \$800,000 of interest bearing floating indebtedness, not then capitalized, the total would reach \$28,509,000. This capitalization, exclusive of the securities held within the system, is comprised of the following:

Mortgage bonds	\$11,209,000
Debenture bonds convertible into stock.....	3,064,000
Capital stock.....	13,436,000
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Total	\$27,709,000
Bills payable.....	800,000
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Total	\$28,509,000
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These securities, however, stand for more than the property of the system now used for supplying electricity and for much more than the original amount of capital, that is, money and

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property or services at their cash value received by the companies forming the system in exchange for their securities. This excess is due to the issue of securities for the following purposes:

Edison license	\$945,000
Guarantee fund for Edison purchase money bond holders, less system securities in fund.....	258,000
Securities given to promoters and contractors for property of Kings County Electric Light and Power Company in excess of investment in its plant, about	2,000,000
Securities issued for Amsterdam Company in excess of the value of the property as per appraisal	361,000
Securities issued in excess of the par value of the securities acquired of the Citizens, Municipal and Edison Companies.....	1,701,000
Stock dividends, Citizens and Municipal Companies	600,000
Discounts and premiums on bonds issued and refunded	775,000
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Total	\$6,640,000
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The original investment in the operating properties of the system was thus less than \$22,000,000.

PROFITABLENESS OF THE ELECTRICAL BUSINESS IN BROOKLYN

The electrical business in Brooklyn was successful from its very inception. One of the early companies paid in cash dividends what amounted to an average 12½ per cent per year on its original stock, excluding such as was issued as stock dividends, another paid an average of about 17 per cent per year in cash dividends on its stock also exclusive of that issued as dividends. The Kings County Electric Light and Power Company has, since 1904, paid 8 per cent on its stock. On the actual amount

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of capital contributed by the security holders in money or in property and devoted by the companies of the system to electrical operations, the total dividends and interest paid have averaged approximately 9 per cent per annum.

RATE MAKING

Section 72 of the Public Service Commissions Law provides: "In determining the price to be charged for gas or electricity the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question although not set forth in the complaint and not within the allegations contained therein, with due regard among other things to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

In the leading case, *Smyth v. Ames*, 169 U. S. 466, 547, it is said: "What the company is entitled to ask is a fair return upon the *value* of *that* which it employs for the public convenience."

In *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, the court used these words: "What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property *at the time* it is being used for the public."

In *Smyth v. Ames*, *supra*, the court lays down certain very general principles to be followed in ascertaining this question of just and reasonable value: "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."

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In *Spring Valley Water Company v. San Francisco*, 165 Fed. Rep. 667, 680, it is said: "He is entitled to a fair return, not always upon the cost of the property, because it may have cost too much; not always upon the outstanding indebtedness, because it may be in excess of the real value of the property; not always upon the total amount invested, because some portion of that which is acquired by the investment may be neither necessary nor presently useful for the public service."

In the *Minnesota Rate Cases*, 230 U. S. 352, 434, it is said: "The ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."

In exercising the "reasonable judgment" the Commission cannot, however, disregard the authority of judicial decisions in litigation involving the same questions. They are found to be controlling, among others, upon the two most important contentions in this case, those relating to depreciation and going value.

The problem before the Commission is, in the first place, to ascertain the value of the physical property of the Edison Company. But this is only one step toward the determination of the ultimate question of the "fair value" of the property for rate making purposes.

THE APPRAISAL

The Commission through its electrical engineer, Clifton W. Wilder, made a detailed inventory and appraisal of the physical property of the Edison Company and through its statisticians and accountants, Dr. Adna F. Weber, Dr. Harry G. Friedman and others, made a careful examination of the accounts and records of the company.

With certain exceptions, to be hereafter considered, the Edison Company offered no objections to the figures submitted by Mr. Wilder; indeed, he made his appraisal in co-operation with the engineers of the company. He undertook, first, to determine the *cost* of the existing property of the system as of January 1, 1914.

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To the extent of 65 per cent of the material and labor cost of the property of the Kings County Company, and of more than 70 per cent of the material and labor cost of the property of the Edison Company, the prices were taken from the vouchers or other records of the company. For the remainder, the cost prices were estimated.

The appraisal did not attempt to establish the cost of a plant adequate for the system needs and constructed in accordance with the latest developments in electrical engineering, but was based on the existing property of the Edison system.

The results arrived at are extremely favorable to the company as is indicated by the testimony of the Commission's engineer as follows: "A general study of prices that we have used all through shows increases in some materials and decreases in manufactured products and, in my opinion, the prices I have used here are equal, if not higher, than prices that could be used in general throughout the appraisal, if we were to figure this on a basis of cost to reproduce as of today."

He also said: "If you figured on the cost to reproduce the property, say within two or three years, that is, some period within which it might be built, the result of my work would be greater than that, because then we would go to minimum prices for wholesale work."

The appraisal thus establishes not only the original cost of the property of the Edison system, but also the maximum allowance that could be made on the basis of the cost of reproduction new.

Mr. Wilder's appraisal arrived at \$24,573,337 as the cost new of the property devoted to electrical operations on January 1, 1914 (excluding property devoted to nonelectrical operations, appraised at \$189,666) and at \$18,812,643 as the cost new less depreciation. These sums embraced land, material and labor costs and allowances for contingencies, incomplete inventory and engineering and superintendence.

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PROPERTY OF EDISON SYSTEM DEVOTED TO ELECTRICAL OPERATIONS AS PER MR. WILDER'S APPRAISAL

Gross material and labor costs.....	\$22,679,930
Engineering and superintendence.....	952,557
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Total cost to construct.....	\$23,632,487
Accrued depreciation	5,760,694
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Cost to construct less depreciation.....	\$17,871,793
Land	940,850
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Total.....	\$18,812,643
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The amount arrived at by the Commission's engineer as to the cost of the property as of January 1, 1914, excluding property not used for electrical operations, interest during construction and other claims of the company, was approximately \$1,000,000 greater than the cost to reproduce new as of July 1, 1914, to wit, \$23,705,314, which was reported by the companies to the State Board of Tax Commissioners. If account be taken of additions during the intervening six months, the difference would be increased to \$1,500,000. The depreciation accrued on the properties of the system was reported by the company as substantially \$10,500,000, or nearly double the amount of depreciation as calculated by the Commission's engineer. The cost of reproduction less depreciation was stated at less than \$13,500,000 or about \$5,300,000 less than the cost-less-depreciation as found by the Commission's engineer. The appraisal by the Commission's engineer seems, therefore, to be very liberal.

The appraisal as of January 1, 1914, should be increased so as to cover the cost of additions made during 1914 and 1915. Account must also be taken of interest during construction, organization expense and working capital. The figures submitted by the engineers and accountants of the Commission as the cost to January 1, 1916, including interest during construction and an increased allowance for real estate, is \$27,735,000, the accrued

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depreciation thereon is calculated at \$7,140,000 and the cost less accrued depreciation arrived at is \$20,595,000.

For organization expenses, the amount submitted on the basis of the record is \$100,000, and the allowance for working capital \$1,000,000. The total is thus approximately \$21,700,000.

Question has been raised with reference to the allowance for the Sixty-sixth street generating station included in the figures given above, at approximately \$1,305,000. This station is but little used, and it has been suggested that the allowance for this property should be based on the cost of installing the equivalent generating capacity at the other station of the system, and that in view of the cost of recent additions made at that station, the amount should be about \$500,000. On this basis, the figures for the cost new, less depreciation, would be about \$20,900,000, or approximately \$21,000,000 as of January 1, 1916.

If allowance is made for the Sixty-sixth street station at the full amount at which it is included in the appraisal as shown above the figures as of January 1, 1916, would be considerably less than \$22,000,000.

Counsel for the company contend, however, that the valuation to be placed on its property should be \$38,822,000 or about \$17,000,000 to \$18,000,000 more than the amounts indicated above. This is a startling figure, and the basis for it requires careful scrutiny. A comparison of the amounts claimed by the company and the corresponding figures submitted by the Commission is shown on the accompanying table (Table A). The differences may be summarized as follows:

DIFFERENCES BETWEEN THE CLAIMS OF BROOKLYN EDISON COMPANY AND AMOUNT SUBMITTED IN BEHALF OF THE COMMISSION

Valuation of physical property:

Contingencies, etc.....	\$649,000
Engineering.....	331,000
Interest during construction.....	55,000
Land.....	37,000
Other differences.....	25,000

Total.....	\$1,097,000
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Depreciation accrued	\$7,140,000
Property little used (Sixty-sixth street generating station), less allowance for additions of equal capacity	804,000
Property, overhead construction and development expenses, etc., paid for out of operating expenses (less allowance of \$100,000 proposed by Commission's staff)	4,033,000
Edison license for patents, presumably expired....	945,000
Working capital	326,000
Cost of unifying the system or establishing monopoly	3,287,000
Additional claims for organization costs Kings County Electric Light and Power Co. (stock issued to Charles Cooper)	300,000
Total	\$17,932,000

TABLE A

*Valuation Claimed by Company and Amount Submitted by Commission's Staff,
December 31, 1915*

	Company's brief	Com- mission's statement	Difference
Material and labor cost as per appraisal (Dec. 31, 1913)	\$22,209,542	\$22,209,542	.....
Contingencies, incomplete inventory, etc. (Dec. 31, 1913)	1,119,224	470,388	\$648,836
Engineering (Dec. 31, 1913)	1,283,303	952,557	330,746
Additions, 1914 and 1915	2,662,360	2,637,107	25,253
Interest during construction	359,648	305,000	54,648
Land	1,197,255	1,160,000	37,255
Total	\$28,831,332	\$27,734,594	\$1,096,738
Deduct — accrued depreciation .....	.....	7,140,000	7,140,000
Net amount	\$28,831,332	\$20,594,594	\$8,236,738
Deduct — amount in excess of service requirements (Sixty-sixth street property)	804,190	804,190

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TABLE A — Continued

	Company's brief	Com- mission's statement	Difference
Net amount.....	\$28,831,332	\$19,790,404	\$9,040,928
Legal, organization, administration, ex- pense, etc.....	¹ 100,000	100,000	.....
Working capital.....	1,325,776	1,000,000	325,776
Total.....	\$30,257,108	\$20,890,404	\$9,366,704
Claims for items charged to operations:			
Lamps installed on consumers' prem- ises.....	\$447,994	.....	\$447,994
Labor, setting meters.....	174,949	.....	174,949
Injuries and damages during construc- tion.....	135,064	.....	135,064
Taxes during construction.....	298,996	.....	298,996
Legal, organization, administration ex- penses, etc.....	² 1,258,238	.....	1,258,238
Cost of attaching business.....	1,670,861	.....	1,670,861
Workmen's compensation insurance deposit.....	47,257	.....	47,257
Total.....	\$4,033,359	.....	\$4,033,359
Edison license.....	\$945,000	.....	\$945,000
Cost of unifying system:			
Amounts paid for securities of com- panies in excess of the value of their tangible property:			
Citizens Electric Illuminating Co....	\$573,811	.....	\$573,811
Municipal Electric Light Co.....	1,020,475	.....	1,020,475
Amsterdam Electric Light and Power Co.....	366,788	.....	366,788
Expenses incident to acquisition of Edison Co. stock:			
Bonds issued for expense of Edison Selling Stockholders Committee..	175,870	.....	175,870
Stock issued to A. N. Brady for ser- vices in purchasing Edison stock..	150,000	.....	150,000
Guarantee fund for benefit of purchase money bondholders.....	1,000,000	.....	1,000,000
Total.....	\$3,286,944	.....	\$3,286,944
Stock issued to Chas. Cooper in con- nection with organization of Kings County Elec. Lt. and Power Co....	\$300,000	.....	\$300,000
Total valuation Dec. 31, 1915..	\$38,822,411	\$20,890,404	\$17,932,007

¹ Included in larger amount claimed by company, as noted below.² This figure is amount claimed by company (\$1,358,238) diminished by the amount submitted in commission's statement (\$100,000).

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As is usual in rate cases, the differences with reference to the cost of physical property are not great. The divergences arise from claims for "overheads," which include contractor's profit, omissions and contingencies, interest during construction, engineering and superintendence, law expenditures during construction, taxes during construction, general executive costs, insurance during construction and miscellaneous construction expenditures, organization, etc., etc. Allowances for overheads must not be imaginary or speculative or without proof by the utility that it is clearly entitled to them. They cannot be allowed merely on the assumption that an item of overhead or something else like it must have been incurred in the construction of its plant and property. The Commission has allowed for "overheads," where such allowances were justified by the evidence.

CONTINGENCIES

The largest item of differences in the valuation of the physical property is about \$649,000 under the head of contingencies and incomplete inventory. What the allowance for contingencies and inventory, etc., should be in any case must depend upon the completeness of the records and the care with which the inventory has been prepared and checked. In these respects, conditions have been exceptionally favorable to accuracy. The company employed its own engineers who co-operated with the Commission's engineers. It had ample opportunity for cross-examination and the introduction of evidence; and it does not appear that the allowances made by the Commission's engineer were at all questioned by the company's engineers or officers.

In planning work, liberal allowance for contingencies must necessarily be made for imperfect foresight. Our appraisal rests, however, on the proverbially more perfect hindsight. Contingencies, not foreseen at the time work was planned, necessarily entered into the cost registered on the books and records. The allowance here made must therefore be chiefly for imperfect inventory. In view of the relative completeness of the records, the allowances cannot be so large as might be proper, if the appraisal were made without regard to conditions as revealed by the records. There should be no departure from the allowance of the Commis-

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sion's engineer merely because this or some other Commissions found it proper in other cases and under other circumstances to make a higher allowance. There is no testimony in the record to justify the claim to this allowance beyond the amount fixed therefor.

ENGINEERING

The amount for engineering in the appraisal was based on the cost as established from the records. Counsel for the company argued that the allowance should be made on the percentage found to obtain in more recent years, rather than upon the basis of a longer period, upon the ground that the records during recent years were better kept. The total amount in dispute here is comparatively small. Mr. Wilder allowed 4.2 per cent on the cost of labor and material including contingencies and incomplete inventory. The company contends that the percentage used should be 5.46 per cent. Applied to the basis figures used by Mr. Wilder, the difference is approximately \$286,000. With depreciation deducted, the net difference as of December 31, 1913, would be about \$216,000, and if account is taken of depreciation subsequently accrued, the amount as of January 1, 1916, would be about \$200,000. Here again there is no evidence beyond what is shown by the books as to what the actual cost of engineering was in earlier years, or the extent to which such costs were at that time included in the price of work done under contract or in operating expenses. There is, therefore, no basis in the record for the additional allowance asked, and in view of the liberal character of the appraisal, the amount found by the Commission's engineer might well be regarded as adequate. The final results in this case would not, however, be appreciably different if the allowance for engineering were based on the higher percentage claimed by the company.

INTEREST DURING CONSTRUCTION

Under the head of interest during construction, the difference between the amount claimed by the company and that arrived at by the Commission is due almost entirely to the inclusion of land by the company in the basis for its calculation. That interest on land is not allowable in a rate case, where the present value of land is used, has been clearly established by the decision of the

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United States Supreme Court in the Minnesota Rate Cases, 230 U. S. 352, 455.

LAND

The Edison Company claims not only that a higher valuation should be allowed on real estate but that certain property classed by Mr. Wilder as not devoted to electrical operations should in fact be included in the valuation on which the company is entitled to a fair return. Mr. Wilder's appraisal of the real estate is based on the assessed valuations for 1914. The record also shows the corresponding data for the years 1915 and 1916. The following are the assessed valuations for all land and for land classed by Mr. Wilder as operative property.

	Land used for	
	All land	electrical operations
1914.....	\$1,031,850	\$940,850
1915.....	990,450	900,950
1916.....	1,006,750	917,250

It was shown that the percentage for equalization applicable to Kings county adopted by the State Board of Equalization in 1914 was 91 and in 1915, 92. The company claimed that real estate at Nos. 370-382 Pearl street and No. 13 Willoughby street had been acquired for additions to its office building and Nos. 27-31 Garfield place for enlarging a substation and that all these properties had already been partly put to use in connection with the company's business and that all would be needed shortly for this purpose. These properties which Mr. Wilder classes as non-operative he appraised for 1913 as follows:

Location	Land	Material and labor cost	Total
370-382 Pearl street.....	\$45,000	\$21,764	\$66,764
13 Willoughby street.....	16,000	12,997	28,997
27-31 Garfield place.....	5,100	9,369	14,469
	<u>\$66,100</u>	<u>\$44,130</u>	<u>\$110,230</u>
Engineering 4.2 per cent.....	1,853	1,853
Total including engineering.	<u>\$66,100</u>	<u>\$45,983</u>	<u>\$112,083</u>

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The assessed value of these items of real estate remained the same for 1914, 1915 and 1916. With these three parcels included the assessments for lands actually used or to be used for electrical operations were as follows:

1914	\$1,006,950
1915	967,050
1916	983,350

The company called a real estate expert who testified that the value of the land at Sixty-sixth street which was assessed at \$356,500 for 1914, and \$314,600 for 1915 and 1916, was \$430,079. This is about 40 per cent in excess of the assessed valuation and nearly four times the original cost, which was \$115,419.

At the close of the testimony the company presented a statement claiming a valuation for its land devoted to electrical operations amounting to \$1,197,255. For the Sixty-sixth street land the value used was that testified to by the company's witness. For other land the original cost was taken where known and where not known the assessed value. If the original cost had been adopted in every case where it is shown by the record the total valuation would have been not more than \$882,596, or about \$125,000 less than the assessed value. Of course, to be consistent the same rule should be adopted in all cases. The company should not be permitted to shift from cost to present value, picking and choosing as the one basis or the other yields a higher figure. All land should be taken at its present value or at its cost. The company offered no definite evidence that the land owned by it, other than the Sixty-sixth street property, should be valued at more than the amount for which it is assessed. If the percentage adopted for Kings county in 1915 by the State Board of Equalization be taken to indicate the extent to which the property is undervalued in assessments, the additional allowance on land, other than at Sixty-sixth street, would be \$58,152. The maximum allowance in any way justified by the record is as follows:

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VALUATION OF LAND

Land at 66th street (valuation of company's expert	\$430,079
Other land, assessed value.....	\$668,750
Additional allowance, assuming assessed value to be 92 per cent of the mar- ket value	58,152
Total	726,902
Total land, present value.....	\$1,156,981

This amount includes the properties at Pearl street, Willoughby street and Garfield place. If, as testified, these properties are reasonably necessary for the service of the public it is proper to include them although perhaps in excess of immediate needs. The total amount for land, including these properties held for additions and extensions, may thus be taken in round figures at \$1,160,000.

It may be noted in passing that this amount is about \$300,000 more than the cost.

OTHER DIFFERENCES

Other differences in the valuation of physical property are minor. They are due chiefly to the fact that construction work in progress at the close of 1913, which had been included in the appraisal by the Commission's engineer, is treated in the company's statement as additions made subsequent to December 31, 1913. The company's figures, if adopted, would thus result in a double allowance for such property.

DEPRECIATION

The chief controversy centers about depreciation. The Commission on the basis of the engineer's testimony deducted from the cost new the sum of \$7,140,000 for accrued depreciation to January 1, 1916. The Commission has had before it various theories of the subject which were reviewed at length in the briefs submitted to it. The company maintains that no deduc-

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tion for accrued depreciation should be made in the valuation of its property, but nevertheless asserts that it should be allowed to set aside annually large sums for renewals. It adopts this view in spite of the fact that the companies of the system reported to the State Board of Tax Commissioners that the accrued depreciation on their property was between 40 and 50 per cent of its reproduction cost.

It has been the consistent determination of the Commission in both capitalization and rate cases to appraise physical property on the basis of present value, deducting accrued depreciation, both physical and functional. Accrued depreciation has been uniformly determined on the so-called straight line basis, and this method has had judicial approval in this state. *People ex rel. Manhattan Railway Company v. Woodbury*, 203 N. Y. 231, 236; *People ex rel. Kings County Lighting Company v. Willcox*, 156 App. Div. 603; 210 N. Y. 479. That depreciation must be deducted in a valuation for rate making purposes is not open to question in view of the decisions of the United States Supreme Court in *Knoxville v. Knoxville Water Company*, 212 U. S. 1, and the *Minnesota Rate Cases*, 230 id. 352.

Counsel for the company ably argued against the application of the depreciation rule in rate valuations, although maintaining the usual claims to appreciation and value represented by securities issued for the nebulous consideration which are discernible only in the "judgment of the corporate directors." But the decision of the Appellate Division of the Supreme Court, First Department, in this State (Clarke, J., with whom concurred Ingraham, P. J., and McLaughlin and Scott, JJ.), in the case of *People ex rel. Kings County Lighting Company v. Willcox*, 156 App. Div. 603; 210 N. Y. 479, is a conclusive authority from which this Commission may not deviate, for the deduction of complete and incomplete depreciation, physical and functional, from the reproduction cost new in valuations for rate making purposes. In that case, the Commission made a deduction for depreciation exactly as it has done in this case. The issue was squarely presented to the court and it was never more ably argued

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on behalf of the utilities than it was by the late Charles F. Mathewson before that court. The court reviewed the question, not alone from the standpoint of constitutional law in an inquiry as to whether property rights of the utility were being confiscated and what, therefore, were the property rights involved, but more particularly from the standpoint whether the order was unreasonable and unauthorized; the court was not confined to the question whether the rate resulted in confiscation or denial of equal protection, but it also considered whether the determination of the Commission was authorized by legal tests. The court held:

“Mr. Mathewson as *amicus curiae* files an interesting brief presenting an elaborate argument in support of the proposition that as it is conceded that the plant of the relator operates at 100 per cent of efficiency there should be no deduction for so-called accrued depreciation. This term is used to designate somewhat inartificially the liability presently accrued toward the ultimate cost of replacement of still efficient apparatus. He, therefore, repudiates the concession to scrap value and claims that as the company, being a public service corporation, must always keep its plant up to efficiency and must replace property when worn out, it is entitled to a rate based upon 100 per cent efficiency because it will never be allowed to capitalize replacement but must provide it when necessary. It, therefore, must be allowed to provide a replacement fund out of its earnings. He argues that it makes no difference to the consumer whether that fund is actually accumulated and on hand or not because the replacement must be made if there is such a fund from it; if not, by the stockholders directly. If on the other hand the valuation of the tangibles is reduced by a percentage, in this case twenty-one per cent, it can never be provided for in the only proper way — out of earnings.

“We are unable to adopt Mr. Mathewson’s interesting theories for these reasons:

“1. It seems to be thoroughly established that the value of the tangible property upon which the company is entitled to a rate which will procure a fair and just return is the present value, that is, at the time of the appraisal for rate-making purposes.

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“ 2. That in the absence of accurate evidence as to actual value, the cost of reproduction *new* takes the place thereof.

“ 3. That, as the property being valued is not new, in order that cost of reproduction *new* may represent the actual condition — the amount invested — there must be a deduction therefrom.

“ 4. That this represents the amount required to replace apparatus still in use, but in process of wearing out, at the end of useful service.

“ 5. That this allowance for depreciation has been made in various kinds of cases where present value is required to be estimated.”

Furthermore, the court approved the straight line method of computing accrued depreciation as one to be applied by the Commission in a case of this kind.

PROPERTY NOT USED OR USEFUL

The question is raised as to whether the property of the Brooklyn Edison Company is in excess of its present needs for public service and therefore whether there should be eliminated from the valuation upon which the rate of return is to be based, an amount for such property as is not used or useful for public service. It is well settled that a utility is not entitled to a return upon property not used or useful for service and that present users cannot be expected to pay a rate sufficiently high to yield a fair return on money invested in excess of the amount reasonably necessary to provide property for the present requirements.

This question arises in connection with the Sixty-sixth street generating station of the company included in the valuation of the Commission's engineer at approximately \$1,305,000 as the cost less depreciation accrued. This station is but little used, relative to the investment involved. The record shows that certain additions made to the Gold street station at a cost of about \$500,000 have provided a greater generating capacity than the total capacity of the Sixty-sixth street station, and that further additions to that station were under contract equal to about twice the present capacity of the Sixty-sixth street station. It is a fair

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question whether the allowance for the Sixty-sixth street station should not be limited to the cost of adding to the Gold street station equipment capable of rendering the equivalent service of the Sixty-sixth street station, and that the amount found as the cost of property less depreciation be therefore reduced for the excess investment in the Sixty-sixth street plant.

It appears that the two stations were built by independent companies and the present system came into possession of them not as the result of a definite plan to provide for the needs of service but as the outcome of the combination of independent companies formed to eliminate competition. Doubtless this accounts for the fact that throughout the history of the present system, only one of the stations has been used extensively, and that during the last eight years the Sixty-sixth street station has furnished but a small part of the current supplied to consumers, the load being carried mainly by the Gold street station. In this instance, however, the record is perhaps not complete on the cost of additional facilities which might be required for taking over the load now carried at the Sixty-sixth street station, the importance of having two stations to ensure continuity of service in emergencies and to provide for the growth of business in the near future. The doubts should in this case be decided in favor of the company in order that there may be no question that it has been dealt with fairly in the valuation of its property. The allowance in this instance made for the present value of the Sixty-sixth street station should not be taken as a precedent that property in excess of reasonable needs for service is to be included in ascertaining the fair value of property on which the company is entitled to a return from the rate payers or as precluding the Commission from considering this question anew.

**PROPERTY, OVERHEAD CONSTRUCTION AND DEVELOPMENT COSTS
CHARGED TO EXPENSES**

The other differences between the amount here allowed and the claims of the company relate mainly to overheads and intangibles. Counsel for the company contends that there should be added to

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the valuation of the property allowances aggregating \$4,033,000 for capital expenditures made out of operating expenses, which, with one exception, are not entered on the books as property. Items of this character are as follows:

Lamps installed on consumers' premises.....	\$447,994
Labor cost of installing meters.....	174,949
Injuries and damages during construction.....	135,064
Taxes during construction.....	298,996
Legal, organization, administration expenses, etc. ...	1,258,238
Cost of attaching business.....	1,670,861
Workmen's compensation insurance deposit.....	47,257
<hr/>	
Total	\$4,033,359
<hr/>	

It is conceded by the company that, if these claims were to be allowed, operating expenses and taxes shown by the books would have to be revised and reduced, and the profits as reported correspondingly increased, for it is clear that the same expenditures cannot be both operating expenses and capital outlays. The extent to which the expenses are overstated and the profits understated is indicated by the brief of the company which shows for 1915 "investment expenditures included in operating expenses" amounting to \$304,198. No account is taken in this figure of the labor cost of installing meters during 1915, for which the amount may be estimated as over \$30,000. The total included in 1915 operating expenses for capital outlays, according to the company's theory, is thus over \$335,000.

From the standpoint of rate making, it makes no substantial difference whether the company's claims are sustained or not. If its theory is accepted, the implication is that profits to the extent of \$335,000 have been concealed in its statement of operating expenses for 1915. The profits so concealed are equal to a return of 8 per cent on the items claimed by the company as properly to be included in the valuation of this property. The company's interests are thus sufficiently conserved if its operating expenses

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covering the items in question are accepted as part of the cost of service to consumers.

The company admits that the amounts at issue have been treated as operating expenses. It does not in these proceedings undertake to restore proper amounts to capital on the basis of a re-examination of vouchers and records but proceeds mainly on hypothetical calculations and estimates. The claims put forward for the purposes of this case are contradicted by its own books, which show that these items have all along been entered as expenses. There is thus little foundation for its contentions.

The accounting provisions of the Commission require that incandescent lamps be charged to expenses. This is property of very short life, and if allowance were to be made for it in the valuation the amount claimed by the company as its cost would have to be considerably reduced in recognition of depreciation. The company has had the option under the accounting regulations of the Commission to charge the labor cost of installing meters as property or as expense, and it has consistently treated the cost as expense.

No injury is done to the company in following its own accounting practice and treating as operating expenses the labor cost of installing meters and the cost of lamps installed on the consumers' premises. Theoretically, these expenditures might perhaps be charged to capital, but the practical bookkeeping difficulty involved in keeping track of such a myriad of small items has doubtless led the company to adopt the practice followed generally by similar companies in this district and sanctioned by the Commission, that of treating these expenditures as operating expenses.

The amount chargeable to capital for injuries and damages is uncertain and debatable; the estimate of the company's witness as of December 31, 1914, was \$126,000, whereas the Commission's accountant computed it to be about \$76,000, or 40 per cent less.

The method used in calculating taxes during construction results in inconsistencies and in an unquestionably excessive figure. These amounts have been charged to expenses and have long since been paid for by the consumers. The company has never attempted

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to segregate taxes applicable to construction from other taxes and it is doubtful whether such a separation can be made. Both as regards injuries and damages and taxes, if the appraisal is to be increased by the amount claimed, the operating expenses as stated on the books must be revised and the profits correspondingly increased, with the result that the increased profits shown by the revision of the accounts would adequately provide for a return on the amount added to the valuation of the property.

The amount asked for legal expenses, organization expenses, administration, etc., rests on no specific evidence to be found in the record. A proper allowance for organization is considered below.

The claim for the cost of attaching business is based wholly on expenditures chargeable under the Commission's accounting orders to expenses, and presumes the right to capitalize permanently all advertising and promotion expenses.

The deposit under the Workmen's Compensation Act represents funds collected under the guise of operating expenses to provide insurance and is very largely invested in New York city bonds yielding a return to the company. To include it in the amount to be used as a basis for rate making would mean the allowance for the difference between the rate of return used in computing rates and the interest earned on the bonds. The practical difference for rate making purposes is therefore small. Logically, the income from this fund should be credited to the insurance reserve, or used to reduce the amount chargeable to the consumer for insurance, and not for the payment of interest or dividends.

It may in fairness be contended that, no matter what are the amounts to be included in the capital accounts under the company's theory, the moneys for the items discussed under this head have been collected from consumers in the rates imposed; and that, therefore, the consumers should not be taxed a second time, for a return on capital which they have contributed. This view strongly appeals to a sense of justice, whatever be the technicalities with regard to title to such property. It is, however, unnecessary in this case to decide this point. The company concedes

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that its operating expenses cover large outlays for capital. It has been shown above that the amounts so included according to the company's calculations are equal to more than a fair return on the amount here in dispute. If, in the calculation of rates, the Commission refuses to follow the speculations of the company as to capital and expense, but assumes as proper for the purposes of this case the operating expenses as they appear on the books, it is certain that the total amount which the company will be permitted to earn will yield a fair return on all of its property including these doubtful items at the valuation set on them by the company itself.

LICENSE UNDER EDISON PATENTS

The company claims an allowance of \$945,000 representing the par value of stock issued for the right to use the Edison patents. Of this amount, \$360,000 was returned by the licensor and distributed in bonuses on securities issued or returned to the Edison treasury and ultimately paid out to the stockholders as part of a special dividend. The net amount of stock retained by the owner of the Edison patents was, therefore, \$585,000. These patents were issued between 1880 and 1883 and necessarily expired about 1900. Whatever the importance claimed for the original patents when the companies first engaged in business, there is no evidence that the licenses give any substantial advantage to the company at the present time. Patents are property with limited life, and sound accounting requires that their cost be written off within the period of their life. The earnings of the system have been ample for that purpose and they should not be carried on the books after their expiration.

There is no basis in the record for a finding by the Commission that the Edison licenses today represent property used or useful in supplying electrical service to the public, and therefore no allowance for them can be made in the valuation. The Legislative committee which, under the direction of Charles E. Hughes, investigated the lighting companies of New York city in 1905, refused to make any allowances for the Edison licenses.

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The same decision was made in other cases. Fuhrmann v. Buffalo General Electric Company, 3 P. S. C. N. Y. (2d Dist) 739, 766; Matter of Union Electric Light & Power Company Investigation, St. Louis Public Service Commission; Matter of Milwaukee Electric Railway & Light Company, 10 Wis. R. R. 92.

WORKING CAPITAL

In addition to its plant, an operating company, the business of which is not run strictly on a cash basis (such as a street railway), must have working capital. Money is necessarily tied up in unpaid bills of consumers for service rendered but not yet paid for and in materials and supplies. The amount required for this purpose is less than the amount charged on the books for expenses or for materials and supplies, because to a certain extent services rendered and supplies furnished to the company are covered by its unpaid bills, unpaid wages, salaries and the like. Thus, a part of the working capital of a company is supplied by its various creditors and involves no carrying charge.

The company makes a claim of \$1,325,776 for working capital. The current assets of the company consist chiefly of cash, materials and supplies and consumers' accounts, and the current liabilities of taxes accrued, unpaid bills, interest accrued, casualty and insurance reserves and consumers' deposits. On consumers' deposits the company is obligated to pay interest at the rate of 6 per cent per annum. As the company would be obliged to supply an equivalent amount of capital on which it would be entitled to a return, if it did not receive such deposits, no reduction should be made for this item. On the other hand, as a witness for the company points out, under current liabilities consideration may be taken of funds accumulated for the payment of dividends averaging about \$90,000 per month for which no entry is made on the books until dividends are declared. The excess of current assets over current liabilities other than consumers' deposits thus amounted at the close of 1914 to less than \$900,000 and at the close of 1915 to about \$1,060,000, or an average for the year of less than \$1,000,000.

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A question in connection with working capital arises with reference to an item not carried on the books, namely, current delivered to consumers for which the meters have not been read or the bills rendered. The average amount of such unbilled current is estimated by the company's witness as about \$220,000 for 1914, and \$245,000 for 1915. The amount at the close of the year may be estimated on the same basis as \$250,000 for 1914 and \$300,000 for 1915. The company's practice, and the general practice of companies in this district, has been to disregard unbilled current on the books; it is not shown either as revenue or as an asset. If such unbilled business is included among the company's assets, it must also be considered in the revenue and surplus accounts. Thus the surplus as of December 31, 1915, would have to be increased by about \$300,000 and the revenue for the year 1915 by about \$50,000. Unless surplus and revenue are so revised, an allowance for unbilled sales would be one-sided and unjust to the consumer, for the true profits of the business will not be revealed. The operating expenses as reported by the company cover the cost of rendering service whether billed or not; the revenue must therefore show the amount to be received for the entire service, else neither operating costs nor profits are accurately stated. On the basis of the increase in unbilled current during 1915 and the general ratio of expenses to revenue, the expenses applicable to the earnings not entered on the books would amount to about \$25,000. This is equal to a 7 per cent return on \$350,000, which is more than the amount of unbilled current. The expenses for 1915 as reported by the company thus cover an allowance for return on any difference between the amount claimed by the company for working capital and the amount indicated by its books. If the company's operating expenses, covering also unbilled current, for 1915 are used as a basis for rate-making, then an allowance will be included adequate to yield a proper return on the amount of unbilled earnings. The amount shown by its books as its working capital, namely, \$1,000,000, may thus be adopted in the assurance that the company's interests are not thereby prejudiced.

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FRANCHISES

The company claims an allowance for the value of its franchises. It is now well established that franchises cannot be included in a valuation for rate-making purposes. The entire subject has been carefully considered in a recent decision of the Court of Errors and Appeals of New Jersey, *Public Service Gas Company v. Board of Public Utility Commissioners*, N. J., 94 Atl. Rep. 634, the reasoning of which should dispose fully of the claims and arguments of the company for an allowance for franchises in this case. That franchises cannot be included is clear from the legislative policy of the State of New York as expressed in sections 55, 69 and 101 of the Public Service Commissions Law to the effect that: “* * * * the Commission shall have no power to authorize the capitalization of any franchise to be a corporation or to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatsoever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to any political subdivision thereof as a consideration for the grant of such franchise or right * * *.”

Counsel cites as a precedent for the allowance of franchise value the Consolidated Gas case, apparently overlooking the exceptional conditions involved therein, and the statement of the court in that case (212 U. S. 19, 44): “What has been said herein regarding the value of the franchise in this case, has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us.”

COST OF UNIFYING THE SYSTEM

A number of other claims submitted by the company may be grouped under the head of the cost of unifying the system, that is to say, the cost of establishing monopoly. The total for amounts of this character appearing in the statement of the company is \$3,287,000. With this sum may be included \$300,000 claimed

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for organization expense of the Kings County Electric Light and Power Company, making the total \$3,587,000.

The details are as follows:

Amounts paid for securities of companies in excess
of the value of their tangible property:

Citizens Electric Illuminating Co.	\$573,811
Municipal Electric Light Co.	1,020,475
Amsterdam Electric Light and Power Co.	366,788

Expenses incident to the acquisition of the stock of
the Edison Electric Illuminating Co:

Expenses of Edison Selling Stockholders' Com- mittee	175,870
Commission to A. N. Brady for purchasing Edi- son Co. stock	150,000
Guarantee fund for benefit of holders of pur- chase money bonds issued to acquire Edison stock *	1,000,000

Stock issued to Charles Cooper in connection with organization of Kings County Electric Light and Power Co.	300,000
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Total	<u>\$3,586,944</u>
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It is not even contended by the company that anything was added to property used in supplying electricity to consumers through the financial transactions which led to the establishment of the monopoly enjoyed by the Brooklyn Edison System. With the exception of the last item which will be considered below, all the additions to the capital accounts here noted resulted from the attempt to establish monopoly in the electrical business in Brooklyn. Monopoly value is not to be included for rate-making purposes. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19. As

* This fund is invested in bonds yielding a return of about 4.7%. The claim of the company is in effect that consumers should make good to the company the difference between the present return from the securities of the fund and a return on the capital at the rate of 8%, regardless of the fact that no part of the capital is used for electrical service.

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stated before, one result of the combination was duplication of plant, and the Commission in taking into the valuation both the Sixty-sixth street and the Gold street plants, has already made an allowance for what might be regarded as a development expense incident to the unification of the system. The additional amounts claimed by the company cannot be allowed. One group of capitalists may pay whatever sum they please for the securities of another group of capitalists, or incur any expenses they see fit. They cannot, however, thereby impose an obligation on the public to give them a return on whatever amount they might pay for such securities. The public was not consulted. The claim on them for a fair return rests on property devoted to public uses, but not on securities issued.

The result of the legislative policy in this State has been the elimination of competition, the avoidance of duplication and the stabilizing of public utility enterprises. These were the effects sought by the constituent companies of the Edison system in unifying their own enterprises. On the theory of the company, it might therefore likewise be contended that the establishment of stricter regulation which has tended to produce similar results, should also be included in the valuation. The claim of the company in this instance is based upon little more than that value should be placed upon the economy and efficiency in operation which resulted from the unification of the system. Whatever recognition may be due to the companies for improvements in their methods of conducting business, which result in better service to the public, these cannot be valued for rate purposes any more than advanced legislation which promotes the security of investors in utility enterprises.

With reference to the securities issued to Charles Cooper at the organization of the Kings County Company, there is no evidence in the record of any property having come to the company at a result of the transaction. The plant and other assets standing on the books were received in return for stocks and bonds issued to contractors, who built its generating station and turned over to the corporation a certain amount in cash. The cash value

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of any property received for the securities issued to Cooper or of the services rendered is highly problematic. Any property contributed has necessarily been taken account of in the appraisal. Services in connection with organization and promotion should be considered the same way as similar services for other companies of the system. Counsel for the company has elsewhere set up large claims for organization expenses for the system as a whole; to add to those another claim for securities issued to Cooper is to ask for a duplication of such allowance.

ORGANIZATION, ETC.

The records of the companies forming the Edison system are remarkably complete and they have been gone over carefully both by the company's and commission's accountants. They failed to reveal any considerable outlay for organization expense, for financing, administration and the like. Expenses of this character, if incurred, were met out of current revenue and treated as ordinary expenses; they called for comparatively little outlay of capital by investors. The system was developed by additions year by year and through funds supplied by stockholders with little, if any, expense for underwriting syndicates, financing, or promotion. When originally organized, each of the companies was comparatively small, and promotion or preliminary expenses of a legitimate character could not have been great. It would be well nigh a hopeless task, as the company's own witness admitted on the stand, to attempt to ascertain the expenditures which should have been charged to capital for organization and similar items.

The company, through its counsel, as noted before, claims an allowance of \$1,358,238 for legal, organization, administration, superintendence, trial operation, etc. No evidence whatsoever is adduced in support of this claim. From the figures of the company's counsel, it appears that on his theory there have been included in operating expenses in recent years \$50,000 to \$100,000 per year for organization and similar expenses. If this is so, there are concealed in operating expenses sufficient profits to yield a return at 7 per cent on an allowance for organization

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and legal expenses, etc., ranging from \$700,000 to \$1,500,000. The company should, therefore, not be aggrieved if its operating expenses are accepted and thereby allowance made on so large an amount.

For the Commission, no such speculations have been attempted. On the basis of the charges made on the books of the system, it is submitted that a fair allowance would be about \$100,000. No substantial difference in the rates would result if the amount were increased to \$200,000 in order to give the benefit of any doubt to the company.

With the amounts allowed for working capital and organization expenses, the total valuation as of January 1, 1916, for the purposes of this case, even allowing the higher figure indicated above for engineering, would be about \$22,000,000.

A claim is made with qualifications on behalf of the company for "going value" as of December 31, 1914, amounting to \$3,636,159. In arriving at this figure it is assumed that the rate should be 9 per cent for the earlier years of the system and 8 per cent for the more recent period. Upon the record, if for the purpose of argument the basis of the company's calculations is unquestioned, it is demonstrated that upon a 7 per cent return throughout the history of the system there was no deficiency in a fair return but that, on the contrary, the public has paid in excess of a fair return approximately \$5,500,000. What rate of return should be taken as fair will be considered below.

In *People ex rel. Kings County Lighting Company v. Willcox*, 210 N. Y. 479, which must be accepted as controlling upon the Commission in its determination with regard to "going value," the court said: "Making proper allowance for the matters just considered and perhaps for others which do not occur to me, I define 'going value' for rate purposes as involved in this case to be the amount equal to the deficiency of net earnings below a fair return on the *actual* investment due *solely* to the time and expenditures reasonably necessary and proper to the development of the business and property to its present stage, and not comprised in the valuation of the physical property."

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It has been shown that the original amount of capital advanced by security holders and devoted to the properties of the Brooklyn Edison system used for electrical operation was approximately \$22,000,000, that the average annual return on capital so invested from the beginning was nearly 9 per cent, and that the company had on January 1, 1916, property valued, for the purpose of this case, at \$22,000,000, or more than the full amount of original investment. This statement should effectively dispose of the company's claims for "going value."

The conclusions may be summed up in the following table:

PROPERTY OF THE BROOKLYN EDISON SYSTEM

	1913	1914	1915
Cost of construction, material, labor, contingencies, engineering.....	\$23,632,487	\$25,126,779	\$26,269,594
Interest during construction.....	285,000	295,000	305,000
Total construction.....	\$23,917,487	\$25,421,779	\$26,574,594
Accrued depreciation.....	5,840,000	6,640,000	7,140,000
Present value.....	\$18,077,487	\$18,781,779	\$19,434,594
Land.....	1,160,000	1,160,000	1,160,000
Working capital.....	\$19,237,487	\$19,941,779	\$20,594,594
	800,000	900,000	1,000,000
Organization.....	\$20,037,487	\$20,841,779	\$21,594,594
	200,000	200,000	200,000
	\$20,237,487	\$21,041,779	\$21,794,594

If the higher figure noted above is adopted for engineering, the totals as of January 1, 1916, would be in round numbers \$22,000,000.

With other property of the company not devoted to electrical operations, the amount on January 1, 1916, would be nearly \$22,200,000, or more than the total capital provided by investors for building up the properties of the Edison system. Thus, whether the basis for valuation be the actual capital invested or the present value of the property, the company will be fairly dealt with if rates are based on a valuation of its property of approximately \$22,000,000.

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RATE OF RETURN

The company claims that it should be allowed to earn 8 per cent on the valuation. The company produced a witness who gave his opinion that 8 per cent would be a proper rate of return. On the other hand, another witness for the company presented a calculation on the basis of the company's records which shows that the stock and bonds of the system had been issued at prices which involved a cost of money to the system averaging about $6\frac{3}{4}$ per cent. This computation took no account of the fact that stock paying dividends of 8 per cent and debentures bearing 6 per cent interest and convertible into stock had been issued at par, although the market price for these securities was far in excess of the par. As a result his calculation produced a figure in excess of the necessary cost.

The record contains extensive data on the securities issued, the consideration received, the rate of interest or dividends paid, and the market prices of securities. From this information it appears that the mortgage bonds of the system sell on an approximately 5 per cent basis and that the stock at the prices quoted yield the purchaser less than 7 per cent. With the existing distribution of the capitalization of the system as between stocks and bonds, the average return on the outstanding securities at the prices quoted is approximately 6 per cent.

The United States Supreme Court in the Consolidated Gas Case, 212 U. S. 19, held that a return of 6 per cent would not be confiscatory. This position was again taken in 1915 in a case involving a relatively small company, viz., the Des Moines Gas Company, 238 U. S. 153. It should be pointed out with reference to the rate of return that regulation and the elimination of competition in the public utility field create a condition of security for capital invested, which should reflect itself in the rate at which capital may be obtained and in the return which the consumer should be required to pay for its use. The position of the Brooklyn Edison system should be exceptionally favorable in this regard. It is located in the money center of the country and has a monopoly of the supply of electric current in a large and very

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rapidly growing territory. With rates subject to regulation it may feel fairly assured of a reasonable return on capital invested. Risks are reduced to a minimum. Under the circumstances, it is a question whether a return of 6 per cent would not be adequate. A return of 7 per cent is certainly generous.

Assuming 7 per cent to be the proper rate of return, the company should have collected in 1915 on the property in service about \$1,500,000 in addition to the amount necessary for operating expenses, taxes and a reserve for accrued depreciation.

In allowing a return at the rate of 7 per cent, after making very liberal provisions for depreciation, the Commission takes adequate account of the necessity of making reservations out of income for surplus and contingencies. On a capitalization in keeping with the fair value of the property and divided about equally between stock and bonds, a 7 per cent return would permit the payment of 5 per cent interest on bonds, 8 per cent dividends on stock and reserves for surplus and contingencies of about \$100,000. If the rate of dividend were 6 per cent, the annual additions to surplus and reserves would be over \$300,000.

The situation may be seen from the table below calculated on a capitalization of \$22,000,00.

INTEREST, DIVIDENDS, AND AMOUNT AVAILABLE FOR SURPLUS
AND RESERVES UNDER A RETURN OF 7 PER CENT

Return at 7% on \$22,000,000 capitalization.....	\$1,540,000
Interest at 5% on \$11,000,000 bonds....	\$550,000
Dividends at 8% on \$11,000,000 stocks..	880,000
	<hr/>
Total requirements for interest and dividends..	1,430,000
	<hr/>
Available for surplus and contingencies.....	\$110,000
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In addition to the provision made in the rate of return for contingencies and surplus, the Commission, in revising the rates, as will appear later, leaves a considerable margin in favor of the company.

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In the argument before the Commission, counsel claimed that the company could not maintain its present dividends if rates were lowered to conform to the rate of return and the valuation as found above. The obligations of the public must be based on the requirements of a fair return on fair value, not on the interest and dividends paid on an inflated capitalization. As was said by the United States Supreme Court in *Stanislaus County v. San Joaquin & Kings River Canal & Irrigation Company*, 192 U. S. 201, 213: "It is not confiscation nor a taking of property without due process of law, nor a denial of equal protection of the laws, to fix water rates so as to give an income of six per cent upon the then value of the property actually used, for the purpose of supplying water as provided by law, even though the company had prior thereto been allowed to fix rates that would secure to it one and a half per cent a month income upon the capital actually invested in the undertaking."

REVENUES AND EXPENSES

To determine the fair cost of service to the consumer, operating expenses and taxes must be added to the amounts required for depreciation and a fair rate of return. The operating expenses appearing on the books of the company for 1915 contain items which are not normal, and which should be deducted in order to ascertain normal operating expenses as a basis for rates to the consumer. Expenditures connected with the rate investigation have been included to the extent of nearly \$70,000. Outlays for this purpose should cease with the termination of proceedings in this case. Other expenses of an extraordinary character or charges not properly applicable to operating expenses amount to about \$25,000. Thus, nearly \$100,000 should be deducted from the expenses appearing on the books, in order to determine what are normal operating charges. In this relation the decision of the Illinois Public Utilities Commission with regard to the treatment of rate procedure expenses is interesting (*Springfield v. Springfield Gas & Electric Co.* [Ill. P. U. C.] P. U. R. 1916 C. 281, 397), where the Commission said: "Since the date upon which respondent's rates were questioned, the cur-

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rent rates for gas in Springfield have been far more than sufficient to compensate the local utility for every reasonable item of expense (including an adequate allowance for return and depreciation). The excess collected during this period is greater by far than the total of both the respondent's and the petitioner's procedure expenses. The Commission finds for the petitioner, that no allowance is to be made to the respondent for extraordinary expenses incurred in this particular rate-making procedure before the Commission. At this time, the Commission is not expressing how it would rule in a case in which the facts disclose no excess revenue to have been collected during the pendency of a rate-making proceeding."

The company asks that it be allowed to include in the cost of service to be covered by the rates an amount now treated as a charge against surplus, of nearly \$80,000 for "appropriations to employees for faithful and efficient service." These expenditures stand for payment to the Brooklyn Edison Investment Fund for the benefit of its employees under a profit-sharing plan. The amount disbursed is dependent upon the rate of dividends paid by the company. If allowance is made for this item in operating expenses, it should be done only with the understanding that such payments will continue at the present rate regardless of the effect of a revision of the rates on dividends.

Allowance is made for annual depreciation, etc., on the basis of the finding of the Commission's engineer for accrued depreciation with adjustments for additions to the property and for overheads. In view of the fact that to an extent minor replacements are taken care of through the repair accounts, the amount here taken into the cost of service for rate-making purposes is sufficient for all purposes contemplated in the Commission's accounting regulations, Account E842, General Amortization—Electric. This amount, or an amount increased in keeping with the growth in the company's property, is to be provided by the consumers for maintaining the integrity of the company's investment in property; it is therefore unavailable for any purpose other than that for which the reserve is here provided, and cannot be changed without affecting the basis of the rate structure here proposed.

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The following table shows a revised statement of operating revenues and expenses for the past three years, and the rate of return on the "fair value" of the property under existing charges for service.

REVISED INCOME STATEMENT AND RETURN ON FAIR VALUE FOR 1913, 1914 AND 1915

	1913	1914	1915
Operating revenues ¹	\$5,649,696	\$6,239,968	\$6,923,552
Revenue deductions (expenses):			
Operating expenses ²	\$2,449,078	\$2,605,906	\$2,771,854
Depreciation, etc. (straight line).....	865,000	930,000	995,000
Taxes.....	450,032	439,547	469,511
Uncollectible bills.....	14,062	16,875	23,106
Total expenses.....	\$3,778,172	\$3,992,328	\$4,259,471
Income from electric operations.....	\$1,871,524	\$2,247,640	\$2,664,081
Fair value ³	\$19,575,000	\$20,650,000	\$21,425,000
Rate of return — per cent ⁴	9.6	10.9	12.4

¹ After deducting abatements on city bills.

² Excluding extraordinary expenses connected with rate proceedings, etc.

³ Average of amounts at beginning and end of year.

⁴ The rate of return here shown is not appreciably affected if the valuation is increased by a higher allowance for engineering involving at the same time some addition to the figure here allowed for depreciation.

The earnings of the company have thus been excessive. The profits from operation in 1915 were adequate to yield a return of 6 per cent on \$44,000,000, or double the amount here found as the "fair value" of the property of the Edison system devoted to electrical operations, and *over 12* per cent on the "fair value" of the property used to supply electricity in Brooklyn. Rates which permit such profits are excessive and exorbitant. Consumers in 1915 paid the company a return of more than \$2,650,000, whereas the company might fairly have collected from them about \$1,500,000. Consumers are thus entitled to reduction in rates of about \$1,150,000.

RATES

The complaint in this case is that the maximum rate to retail consumers is excessive and that rates to other customers give them

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undue preference and discriminate unjustly against the smaller consumers. The discussion on property and income has established the fact that the return afforded by the rates now in force is excessive and should be reduced. It becomes the duty of the Commission, therefore, under the provisions of the law to inquire into the entire rate schedule of the company and to fix just and reasonable rates.

The table below shows in condensed form the business of the company with different classes of customers, and the average price paid by them. An appended table presents the data in greater detail.

SALE OF ELECTRIC CURRENT REVENUE AND PRICE PER KILOWATT HOUR FOR
YEAR 1915

CLASSIFICATION	AVERAGE NUMBER OF METERS FOR YEAR		SALES KW. HRS.		REVENUE		
	Number	Per cent of total	Amount	Per cent of total	Amount	Per cent of total	Average price per kw. hr. (cents)
Residence.....	28,412	49.0	8,037,180	5.6	\$877,576	12.7	10.919
Commercial.....	22,296	38.5	33,080,682	23.0	2,854,287	41.4	8.628
Advertising.....	344	0.6	1,074,205	0.7	62,763	0.9	5.843
Total light...	51,052	88.1	42,192,067	29.3	\$3,794,626	55.0	8.994
Total power.....	5,231	9.1	20,292,552	14.1	967,419	14.0	4.767
Total retail..	56,283	97.2	62,484,619	43.4	\$4,762,045	69.0	7.621
Large customers:							
Low tension ¹ ...	1,037	1.8	37,719,096	26.2	\$1,066,789	15.5	2.828
High tension...	10	—	29,508,201	20.5	343,321	5.0	1.163
Total general.	1,047	1.8	67,227,297	46.7	\$1,410,110	20.5	2.098
Municipal light and power.....	600	1.0	14,286,024	9.9	723,660	10.5	5.066
Total sales...	57,930	100.0	143,997,940	100.0	\$6,895,815	100.0	4.789

¹ Includes high tension service to Governor's Island. 215,100 kilowatt hours, revenue \$10,104 and also miscellaneous sales of current supplied to eighteen meters — viz.: 154,080 kilowatt hours, revenue, \$6,543.

The schedule of charges for service of the Brooklyn Edison System reveals a very wide divergence between rates paid by different classes of consumers. The great mass of lighting customers pay the maximum rate of 11 cents per kilowatt hour; at the other extreme, a limited number of consumers receive service

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at prices averaging less than two cents for low tension and about one cent for high tension current. The rate schedule of the company makes large concessions to quantity consumers. What is the justification for such difference, in the price charged to different classes?

In this inquiry, certain considerations should be borne in mind:

(1) Rates should take account of expenses directly assignable to the individual consumer or to a special class of consumers.

This can be done either directly through a special meter, consumer, or minimum charge, or indirectly through the rate for current. Directly, or indirectly, account should be taken of the cost occasioned by the consumer through the mere fact that he is connected with the company's system, and can at any time demand service, and the expense of whatever special service is rendered to the class of consumers to which he belongs.

(2) Rates to different customers and classes of customers may be differentiated so as to reflect the time and conditions of service.

The central station must be operated so as to furnish service twenty-four hours a day for 365 days in the year. The plant and organization must be adequate to meet the maximum demand made by the consumers at any time. The maximum load developed as the result of the demands of the consumers lasts for only a part of the day and occurs only during the winter months. In consequence, a large part of the equipment of an electric company is idle or operated below capacity during the greater part of the day and of the year. It is to the interest of a company to develop business involving off-peak service, since energy taken off the peak adds comparatively little to overhead cost for maintenance, return on investment, depreciation and general expenses, and occasions possibly less than the average cost per kilowatt hour for direct operating expenses. There is thus commercial justification for differentiating rates according to conditions of service, and for making lower rates for off-peak service. A very large part of the total cost of service is represented by the requirements for depreciation, maintenance and a return on the general investment of the company and the special investment made for the benefit of individual consumers. Such costs and certain general expenses are in

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the main fixed and do not vary significantly with the intensity of use to which the property is put. It follows, therefore, that with a given maximum demand on the part of the consumer, each additional hour's use of current involves less than a proportionate increase in cost to the company. Rates to the consumer may therefore take this factor into account, and a higher price may be charged for the initial hour or for the first few hours' use of current per day, than for additional hours of use. Within proper limits, differences in price paid by consumers, based upon differences in time and conditions of use, need not be unjustly discriminatory. A flat rate to all consumers, such as is usual in the gas industry, is not adapted to the needs of the central electric station business.

Differentiation in the price charged according to varying conditions of service presented by classes of consumers must be related to costs attributable to such conditions, else the rates will be unjustly discriminatory. The ascertainment of costs presents, however, extremely difficult problems. The cost of supplying electricity is made up, for the most part, of joint costs, of expenses which cannot be directly allocated to any one class. The outlays which can be more or less directly assigned to classes of customers form a comparatively small portion of the total cost of service — including in cost a provision for depreciation and a return on investment. Expenditures for investment and for operation, which can be allocated to different consumers or classes of consumers, include investment in meters, services and street lighting equipment, expenses attending the operation of meters and billing and collecting customers' accounts; the cost of supplying and renewing incandescent lamps to retail customers; the direct expenses incurred for street lighting; and the like. Examination of the details of the appraisal and of operating expenses, indicates that less than 20 per cent of the cost of service covering a return on the investment, depreciation and operating expenses, permits of reasonably direct assignment to the different classes of consumers. The rest, if apportioned, must be allocated chiefly on the basis of load factors; that is, upon the responsibility of a given class of consumers for the peak load on the substation and on the generating

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station of the system. Such allocation presents most complicated problems and results will vary widely with the hypotheses made. From the record it appears that the company has no data or calculations serving as the basis for its rates to different classes of consumers.

The average price paid by retail lighting customers is over three times the average price charged to wholesale customers; in both cases, the service referred to is low tension current. If full account is taken of the special expense chargeable against the retail customers, as indicated by the record, their contribution per kilowatt hour is still more than double that of the wholesale customers. Rates for low tension current would thus have to be justified on uncertain assumptions as to what proportion of property jointly used and operating expenses incurred in common may be applied to particular classes of service.

Within the retail class, lighting customers pay nearly twice as much as power customers. Here too, it does not appear that difference in price can be related to clearly identifiable costs incurred for the benefit of each of these classes of consumers.

The general manager of the company referring to the costs for the various classes of service testified as follows: "It is such a complicated question to figure upon, to get within any degree of accuracy the cost of different classes, that it is practically impossible to answer your question; you might pro-rate your expense one way and I might the other way; it is going to be absolutely a question of judgment as to how those questions are to be pro-rated."

As compared with retail rates, rates to large customers are low, and the presumption in this case might well be that they are too low. In general, such rates are made under stress of competition with isolated plants or steam power. Owing to the threatened establishment of isolated plants by large consumers, the pressure on the company is to make rates as low as possible.

The large consumers of current have made no complaint in regard to their rates, and the company has been free to raise them. The complainant, on the other hand, contends that these rates are too low, that they do not pay a fair proportion of the total cost and

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that they impose an unjust burden on the retail consumers. If the assumption is that such rates are fair, it follows that the excess of revenue over the requirements of a fair rate of return should be applied to reduce the rates paid by retail customers. If the charge for current to large customers is too low, then retail consumers should have the benefit of even a greater reduction than the present excess over the requirements of a fair return. In either event, it is the retail customers who should benefit primarily in the reduction of the rates.

The table below indicates the extent of the reduction to which retail consumers are entitled, assuming that the rates now made to large consumers (including the city) are just.

COST OF SERVICE INCLUDING A FAIR RETURN IN 1915 AND
REVENUE COLLECTIBLE FROM RETAIL CUSTOMERS

Average investment during 1915....\$21,425,000

Amount required for operating ex-
penses, taxes, depreciation and re-
turn at 7 per cent:

Operating expenses, taxes, uncollectible bills..	\$3,265,000
Depreciation	995,000
Return at 7 per cent.....	1,500,000

Total	\$5,760,000
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Revenue from wholesale customers:

Low tension	\$1,067,000
High tension	343,000
City of N. Y.; street lighting....	495,000
High tension and bridge lighting.	81,000
Miscellaneous revenue (merchandising, etc.)	32,000

Total	2,018,000
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Revenue to be raised from retail lighting and power
customers (including municipal buildings).... \$3,742,000

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Retail light and power revenues:

Light	\$3,795,000
Power	967,000
Municipal buildings	147,000

Total	\$4,909,000
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Excess revenue derived from retail customers . . .	\$1,167,000
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If the prices paid by large customers are remunerative to the company, then the rates imposed on retail customers are excessive and should be reduced by more than \$1,150,000.

RETAIL RATES

The retail business of the Brooklyn Edison Company in 1915 was responsible for 43 per cent of the total sales of electric energy, and nearly 70 per cent of the total revenue. Over 97 per cent of the meters in use were in the service of retail customers, who constituted about 99 per cent of the total number of consumers. The most important part of the company's business is retail lighting which alone accounted for over 55 per cent of the entire revenue in 1915.

The schedule of the company for retail lighting is as follows:

Eleven cents for the first two hours' average daily use of maximum demand.

Eight cents for the second two hours' average daily use of maximum demand.

Four cents for the excess over four hours' average daily use of maximum demand.

The maximum demand, except in comparatively few cases, is assumed to be a percentage of the capacity of the installation on the consumer's premises or the connected load, viz., 50 per cent for residences and 70 per cent for other premises. In calculating the maximum demand, however, no installation is rated at less than one and one-half kilowatts.

The lighting rates cover not only the supply of current, but also lamp service. So called Gem lamps are furnished in thirty and fifty watt sizes — the sizes suitable for domestic purposes. Tungs-

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ten lamps are supplied in one hundred watt and larger sizes; such lamps are too powerful for ordinary use in homes. Tungsten lamps in smaller sizes may be obtained on payment of fifteen cents per lamp. The lighting schedule, moreover, involves a minimum charge of twelve dollars per year per meter payable at the rate of one dollar per month. This amount may be absorbed in the charge made for current at the regular rates. As a result of the minimum charge, consumers who use less than nine kilowatt hours per month during the year pay more than the maximum rate of eleven cents per kilowatt hour, but no additional burden is thus imposed on the consumer who consumes an average of nine kilowatt hours or more per month.

In considering the retail lighting schedule, note should be taken of (1) the method of determining the maximum demand of the consumers; (2) the lamp service included in the rates; (3) the minimum charge; and (4) the price per kilowatt hour.

In form, the schedule purports to take into account two factors: maximum demand and the average daily use of the maximum demand during the month. In practice, however, the limitations introduced tend to nullify these considerations in the bills rendered to the great majority of lighting customers. The underlying theory of this system of charging on the basis of maximum demand is that the responsibility of the customer for the general investment of the company is in large measure determined by his demand. As current is used an increasing number of hours per day, there will be no proportional increase in cost to the company for supplying current, for no additional investment is needed. If the rate for the first few hours of service on the basis of maximum demand is made to cover the overhead costs or a large part of them, lower rates may be given to the consumer for current used thereafter. This system of charging involves the ascertainment of the maximum demand of the consumer and the fairness of the charge for service to different customers will depend on the method of arriving at maximum demand.

MAXIMUM DEMAND

It is apparently impracticable in the case of small customers to resort to special demand meters, owing to the outlay required

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for such instruments and the cost of operating them. It is, therefore, usual to base the maximum demand of small consumers on estimates or certain percentages of the connected load. The basis employed by the Brooklyn Edison Company is open to very serious criticism. In the first place, the maximum demand is assumed to be at least one and one-half kilowatts. The record, however, shows that 85 per cent of the residence lighting customers, and 65 per cent of the commercial customers have installations of less than one and one-half kilowatts capacity. It appears further that two-thirds of all the meters of the company have a capacity of one and one-fourth kilowatts or less. The percentages used by the company in calculating the maximum demand are, moreover, in conflict with the schedule used by the company in determining the proper meter capacity for the connected load upon the consumers' premises. According to this schedule, the proper meter capacity for residences and apartments is 25 per cent of the total connected load, and for most commercial establishments it is 60 per cent. For the system as a whole, it appears that the maximum demand is only 30 per cent of the connected load. Moreover, if account be taken of transmission, transformation and conversion losses, the maximum demand on the generating system is about 25 per cent of the total connected load of all consumers. The diversity in the time of the maximum demand is likely to be greatest among residence consumers; it will not be as great among commercial lighting and power customers. The maximum demand of retail consumers as it registers itself in the actual demand on the company's system is a far lower percentage of their installation than that used by the company in its schedule of rates.

On the basis of all the information in the record, the percentages of the connected load used for calculating the maximum demand should not exceed the following: 25 per cent for residences; 50 per cent for other premises; minimum rating 250 watts.

The adoption of a minimum rating is here suggested for the convenience of the company, in order to avoid the expense of inspection that might result from an attempt to secure exact figures for small installations. A schedule similar to the above

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was adopted in the Buffalo Electric case. *Fuhrmann v. Buffalo Electric Co.*, 3 P. S. C. N. Y. (2d Dist.) 806.

Under the present schedule, the percentages used for determining the maximum demand involve discrimination as between consumers with small installations and those with larger installations. It imposes upon all consumers a charge of eleven cents per kilowatt hour for the first ninety kilowatt hours whether they use current many hours of the day, or only for very short periods. They cannot obtain current at the eight-cent or four-cent rates on the same terms as consumers with larger installations. The proposed schedule will eliminate, for the most part, the discrimination based upon the size of installations, and allow customers, large and small, to benefit by the lower rates available for long-hour use of current. The complainants criticize the maximum demand basis for electric rates, but the criticism applies mainly to certain features of practice which have grown up in connection with it and which can be properly remedied.

LAMP RENEWALS

The existing lamp renewal practice of this company is objectionable in that the lamps furnished are mainly Gem lamps which consume between two and two and a half times the amount of energy required for the same amount of light by tungsten lamps. The subject of lamp renewals has been dealt with at length by the Commission in the recent cases involving the United Electric Light & Power Company and the New York Edison Company, 6 P. S. C. N. Y. (1st Dist.) 289. No new features are presented here. The order of the Commission in those cases required the discontinuance of the use of Gem lamps and the adoption of the tungsten lamp as the standard. The Brooklyn Edison Company should conform with that standard, and the consumer should be given the opportunity either to take more light for the same money, or to make a saving on the amount of his electric bill.

In the case of the New York Edison Company, the order of the Commission fixing rates for electricity established a price for current, exclusive of lamps, and that company, as also the United Electric Light and Power Company, undertook to supply lamps

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under a separate contract at one-half cent per kilowatt hour. With the growing use of electricity for domestic appliances, such as toasters, fans, vacuum cleaners, etc., operated from lighting sockets, it seems proper to separate the charge for current from the charge for lamps. Such a segregation would tend to encourage the use of electricity for domestic appliances, as the consumer of current for such purposes would not be obliged to pay for lamps. Moreover, rapid improvements are going on in the art of lamp making; the gas-filled lamp has been introduced and has, to an extent, displaced the tungsten lamp. A rate for current should therefore be adopted which would leave the consumer free to adopt the most economical type of lamp that may be offered in the market. From the record it appears that the cost of lamp renewals is approximately one-half cent per kilowatt hour. The company should, therefore, be given the opportunity to furnish lamps to such consumers as desire the service at one-half cent per kilowatt hour in addition to the charge for current. The standard lamp to be supplied at this rate should be the fifty watt tungsten, which consumes about the same amount of energy as the fifty watt Gem. As the cost of renewals per kilowatt hour is relatively higher for smaller sizes, the company should be allowed, subject to the approval of the Commission, to make a charge for smaller lamps in addition to the one-half cent renewal rate.

MINIMUM CHARGE

The company requires from its lighting customers a guarantee of twelve dollars per year per meter. The justification for the guarantee lies in the considerations which have led companies and commissions generally to adopt a meter or consumer charge or minimum charge. The mere connection which makes service possible involves an investment on the consumer's premises and certain expenses for maintaining the meter, indexing, billing, etc., regardless of the amount of current consumed. The minimum bill now in effect serves many of the uses of a meter charge or consumer charge, and the practice of the company, may, therefore, be left undisturbed.

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REVISED RATES

The first requisite of a system of rates from the standpoint of business is that it should yield adequate revenue. If this were the sole consideration, the amount chargeable to the retail customer could be collected under a flat rate without regard to time or conditions of use. Thus, a rate of six and one-half cents per kilowatt hour, imposed on retail lighting customers, to cover both the charge for energy and for lamp service, would yield the revenue that may fairly be required from this class of consumers, and the Commission would not be justified in permitting any higher charge. If the average price paid by retail power customers were to be increased, a charge of six cents per kilowatt hour would be adequate. The objection to a flat rate is that it takes no account of the fact that certain consumer costs are to a great extent the same for all customers whether large or small. Again, it disregards the fact that consumers using current an increasing number of hours do not impose on the system the same cost for each additional hour's use of energy. A flat rate for electricity means the same price per kilowatt hour to the casual or short-hour customer who is least likely to be profitable to the company, and to the long-hour customer, whom it is to the interest of the company to foster. For these reasons, a flat charge per kilowatt hour without regard either to the quantity of current taken or hours of use should not be established.

The element of consumer costs which are largely common to all customers, regardless of the amount of current they consume, might be taken care of through a schedule of meter charges. If a monthly charge of fifty cents per meter were imposed as a condition of service, a rate of six cents per kilowatt hour would provide the revenue which might be assessed against the lighting customers, or the price for current might be made five and one-half cents with a charge of one-half cent per kilowatt hour to customers desiring lamp service. If the meter charge were made higher, the charge for current might be reduced still lower. A schedule of this type would to an extent eliminate the objection to a flat rate applicable to all customers. This system of charging for electricity would still fail, however, to differentiate

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between the customer who uses current for one hour a day and the one who uses current for three or four hours per day.

In revising the lighting rates, the general system employed by the company of differentiating rates in accordance with hours' use may be approved in principle and higher rates fixed for current used on the average one or a few hours per day than for current used a considerable number of hours. Such a system will tend to stimulate the application of electricity to new uses during the day, particularly in the home, as current for such purposes would in effect be obtainable at a lower price than under a flat rate. In strict logic, it might be desirable to impose a consumer charge to take care of the special investment and special expense more or less directly chargeable to each consumer, and to levy general rates for current varying with hours' use to cover such costs incurred in serving a class as cannot be allocated to the individual consumers. In practice, however, a consumer charge superimposed upon a system of rates based on demand and hours of use would result in a complicated schedule not easily understood by the customer. The company now has in effect a mini-individual consumers. In practice, however, a consumer charges there is, therefore, less necessity in this instance for establishing such a payment. Rates may accordingly therefore be fixed subject to a minimum bill of one dollar, as at present, and the consumer cost included in the price for current.

Counsel for the company alleges that under the present maximum rate a large group of retail customers do not yield revenue sufficient to cover the expenses of metering and billing and the cost incident to the direct investment chargeable to them, and thus occasion a loss to the company. The claims of counsel exaggerate the expense of serving the relatively small customer. In estimating the consumer cost he includes outlays for advertising and promotion and apportions such expenses equally among all customers regardless of their consumption of current. Such expenses cannot logically be charged against business that is unprofitable and which presumably the company should not seek or solicit. Counsel has similarly allocated the loss on uncollectible bills equally among all customers, thus making an assumption

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which does not appear reasonable. He has further charged as part of the consumer cost a return on the investment in a large part of the mains, and the expense of maintaining them. It cannot well be contended that the investment in mains, or the cost of maintaining them can be directly charged against each consumer in the same way as investment in meters or the expense of meter reading. Mains are not installed for individual consumers but for general service, and the investment and operating costs applicable to them should be defrayed through the rates in the same way as other investment and operating costs not directly attributable to individual consumers. Without entering into a detailed examination of the figures presented by counsel for the company, it will be sufficient to note here that if his statement is revised so as to exclude items relating to mains, to advertising and soliciting and to uncollectible bills, the consumer costs shown by him are reduced by more than 50 per cent. It thus appears that the customers now paying the maximum rate do not cause a loss to the company, but on the contrary pay not only the direct consumer costs, but yield in addition a net revenue of six cents per kilowatt hour available to meet operating expenses, taxes, depreciation, and the requirements of a fair rate of return.* This amount, after deducting one-

*SALES TO CUSTOMERS PAYING MAXIMUM RATE

Kw. hrs. consumed (per month)	No. of bills	Kw. hrs. used	Amount of bill	Direct cost of service \$1.31 per month ¹	Difference	Direct cost of service per kw. hr.	Difference per kw. hr. sold
Under 9.9...	7,005	43,510	\$5,784	\$9,177	² \$3,392	21.1¢	³ 7.8¢
10 to 14.9...	6,841	81,475	8,939	18,962	² 23	11.0¢	.....
15 " 29.9...	12,676	265,864	29,221	16,605	12,615	6.2¢	4.7¢
30 " 59.9...	9,064	376,420	41,410	1,874	29,537	3.1¢	7.8¢
60 " 89.9...	3,066	221,878	24,366	4,016	20,349	1.8¢	9.2¢
Total.....	38,652	989,147	\$109,720	\$50,634	\$59,086	5.1¢	6.0¢

¹ Based on the statement of counsel for the company, excluding however amounts relating to mains, advertising and soliciting and uncollectible bills.

² Minus,

³ This loss is overstated, for if these customers' consumption averaged less than 9 kilowatt hours per month during the year, the revenue from them would be \$7,005 instead of \$5,784 and the difference between the direct cost of service here considered and the revenue would be \$2,172 instead of \$3,392.

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half cent for lamps supplied to retail lighting customers, is still about double the average price paid by wholesale low tension customers. The conclusion here indicated is that the maximum rate paid by this class of consumers is excessive and exorbitant.

Some small customers are no doubt served at a loss, but this class is of limited significance in the retail lighting business. Moreover, rates must be class rates and not rates for limited groups of consumers, and, within reasonable limits, it is not necessary that each and every member of a class should yield a profit so long as the class as a whole is profitable. The imposition of a very high rate on a limited group or part of a class might be of doubtful expediency if it tended to discourage business from a class highly profitable, taken as a whole. A maximum rate need, therefore, not be so high as to insure a profit on every customer who chooses to take service, particularly when a minimum charge is imposed, which serves to discourage unprofitable business.

Under the system of charging for service followed by the Brooklyn Edison Company, the maximum rate is part of a schedule or series of rates. The highest price applies to a consumption of current equal to two hours' average daily use of the maximum demand, and lower rates are charged for additional current purchased. A maximum rate cannot, therefore, be adopted independently of the other rates, which are to form parts of the schedule. As noted above, if a flat rate per kilowatt hour were adopted, six cents or six and one-half cents would be adequate to yield the revenue which should be collected from lighting consumers. Account should, however, be taken of conditions of service, and long-hour consumers given a lower rate than short-hour consumers; for otherwise rates would be unjustly discriminatory as between various lighting customers. The maximum rate should accordingly be made higher than the average rate, to take account of the relatively greater cost of serving short-hour customers, and lower rates adopted for consumers making intensive or long-hour use of current in respect to their maximum demand. To meet these requirements, the following schedule of lighting rates should be adopted for current (excluding the installation or renewal of lamps): Eight cents for the first two hours average daily use per

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month; six cents for the second two hours average daily use per month; four cents for the excess over four hours average daily use per month.

The effect on revenue of the proposed revision of the lighting rates is shown in the following table, based on the sales for the year 1915. Sales of current have been redistributed by hours use, in accordance with the revised ratings of maximum demand, recommended above. This calculation is based on the data for connecting load and current consumed, as reported by the company for the month of April, 1915. The revenue from the lamp installation and renewal charge is here estimated conservatively, being computed on the basis of the present cost to the company of the lamp service, or the amount it would save if it ceased to supply lamps. If all lighting customers paid one-half cent per kilowatt hour the revenue from this source would be about \$35,000 more than the figure here used. In order that the calculations might err on the side of safety, no account is taken of revenue which will accrue to the company from the minimum charge, where customers fail to use current up to the amount of \$1 per month.

REVENUE FROM RETAIL RESIDENCE AND COMMERCIAL LIGHTING FOR 1915 ON BASIS OF PROPOSED RATE SCHEDULE

		Kilowatt hours used ¹	Rate	Revenue
Average daily use per month				
First two hours.....		17,544,458	8¢	\$1,403,557
Second two hours.....		9,446,748	6¢	566,805
Excess over four hours.....		14,000,417	4¢	560,017
Total.....		40,991,623	² 6.2¢	\$2,530,379
Estimated revenue from charge for lamp installation and renewals.			.4¢	165,000
Total revenue: Proposed schedule of rates.....			6.6¢	\$2,695,379
Present schedule of rates.....			9.1¢	3,718,938
Reduction to retail lighting customers.....			2.5¢	\$1,023,559
Average rate per kilowatt hour:				
Present rate schedule.....			9.1¢	
Proposed rate schedule.....			6.6¢	
Reduction: Amount per kilowatt hour.....			2.5¢	
Per cent.....			27.5	

¹ Includes sales to customers with prepayment meters, but excludes breakdown service.

² Average.

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It may be estimated that the reduction to retail lighting customers under the schedule recommended will be upwards of \$1,000,000, and that on the average consumers' bills will be reduced between 25 and 30 per cent.

The charges of the company for advertising service are now below the average retail price provided by the proposed schedule, and these rates need not be disturbed. On the other hand, the rates here proposed should be made applicable also to the city which now pays a retail price of eight cents per kilowatt hour for lighting public buildings. While the amount of reduction to the city under the revised rates cannot be accurately determined, it may be estimated at about \$15,000.

RETAIL RATES FOR POWER

The maximum rate established for current supplied for lighting should be made applicable also to energy supplied for use as power. The highest price now charged to retail power consumers is ten cents per kilowatt hour. In a limited number of cases, the power service is rendered under lighting rates and a higher price charged.

The schedule of power rates is as follows: Ten cents for the first twenty-five hours monthly use of the maximum demand; five cents for the second twenty-five hours monthly use of the maximum demand; three cents for the excess over fifty hours monthly use of the maximum demand.

The three-cent rate is, moreover, subject to a schedule of discounts as follows: Whenever the portion of the bill figured at three cents per kilowatt hour exceeds \$25, the discount shall be 5 per cent; \$50, the discount shall be 10 per cent; \$150, the discount shall be 15 per cent; \$200, the discount shall be 20 per cent; \$300, the discount shall be 30 per cent; \$400, the discount shall be 40 per cent; \$500, the discount shall be 45 per cent; \$1,000, the discount shall be 50 per cent.

Intermediate discounts are determined by interpolation.

These discounts are substantially rebates given to a limited number of customers on the basis of the amount of their bills. Quantity discounts are not in keeping with the underlying theory

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of the company's system of rates; they result in unjust discrimination and should be abolished. If rates below three cents are to be allowed on any portion of the current used by a consumer, this should be done directly and not under the guise of discounts. Such rates should take the form of a price applicable to current in excess of a specific number of hours use of the maximum demand and should be equally applicable to all customers using current the same number of hours relative to their maximum demand, regardless of the amount of their bills. The abolition of the schedule of discounts will mean a saving to the company of approximately \$40,000 which will be available for further adjustments by the company in its rate schedules.

The following table shows the sales for 1915 under the maximum demand power schedule, and the significance of a reduction of the maximum rate from ten cents to eight cents and the abolition of discounts.

REVENUE FROM SALE OF CURRENT FOR POWER TO RETAIL CUSTOMERS UNDER MAXIMUM DEMAND CONTRACT, AND CALCULATED AMOUNT ASSUMING A RATE OF 8 CENTS FOR FIRST 25 HOURS' USE OF MAXIMUM DEMAND

Use of maximum demand per month	Kilowatt hours used	Revenue			
		Present rates		Proposed rates	
		Average price (cents)	Amount	Rate (cents)	Amount
First 25 hours.....	4,561,628.8	10.105	\$460,962 75	8.000	\$364,930 30
Second 25 hours.....	3,362,536.2	5.001	168,145 73	5.000	168,126 81
Over 50 hours.....	12,115,989.9	2.658	322,014 58	3.000	363,479 70
	20,040,154.9	4.746	\$951,123 06	4.474	\$896,536 81
Reduction.....	.....	.....	.....	.272	\$54,5865

1 Three cents less discounts.

The establishment of an eight-cent maximum rate for current supplied for power, together with the elimination of the schedule of discriminatory discounts will result in a saving to retail power

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customers of about \$60,000. The average reduction to such consumers will be about 6 per cent.; customers now paying the highest rate will, however, save about 20 per cent.

SAVING TO RETAIL CUSTOMERS

As a result of the rate revision here proposed, the total saving to retail consumers may be estimated on the basis of 1915 sales at about \$1,100,000. This is possibly less than the reduction to which such customers are entitled, a margin being left to the company for further changes which it may find necessary or desirable to make in connection with the rate adjustments here proposed.

RATES TO LARGE CUSTOMERS

The sale of current to large consumers at comparatively low rates absorbs about one-half of the total output of the company. This service presents some of the most complex problems in rate making, and most frequently gives rise to the charge of discrimination. A single large customer may take as much current as is used by an entire class of small consumers and special efforts are made to secure such business. Large customers are often in a position to instal their own plants or to use other forms of energy and the price made to them is therefore likely to be affected by competition to a much greater extent than retail rates. Large consumers are in a strong position to bargain with the central station and to stand out for favorable rates.

There are two classes of large consumers, those using low tension current and those using high tension current. They may be considered separately.

Large consumers of low tension current are served by the Brooklyn Edison Company under three types of rates: (1) the so-called "wholesale" rate, based entirely on the quantity of current used; (2) the maximum demand rate, based on demand and hours used; and (3) rate "B," based on a fixed price per kilowatt of demand supplemented by a charge per kilowatt hour for current consumed.

The so-called "wholesale" rate is purely a quantity rate for current used for either light or power. It departs entirely from

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the principle of charging according to the maximum demand and hours use. There is no fundamental justification for a rate of this type. It should be abolished and the customers served under it billed under appropriate light or power schedules.

The maximum demand rate as applied to large customers is part of the schedule under which current is sold to retail power customers. Large consumers may, however, use current under this rate for light as well as for power and secure larger discounts than those generally applicable to the three-cent step under this schedule. Moreover, customers whose bills amount to more than \$10,000 per year are allowed additional discounts on this excess ranging from 10 to 30 per cent. In 1915 only two customers benefited by this feature in the rate schedule. Discounts calculated entirely on the amount of the bill, and not on the conditions under which service is rendered, constitute unjust discrimination and should be abolished.

Rate "B" is based on a charge per kilowatt supplemented by a rate per kilowatt hour for current used. The kilowatt hour price varies not with hours of use relative to the maximum demand, but with the gross amount of current taken monthly. This form of charge tends to discriminate between customers served under this schedule on the basis of quantity and is unjust.

The so-called maximum demand rates as applied to large customers and rate "B" should be simplified, and a single rate schedule framed for large consumers, which shall eliminate quantity discounts and variations in price based merely on the amount of current consumed. The company should adopt a schedule which will take account of the consumer's load factor in its relation to the company's peak, and should submit such revised schedule for the approval of the Commission.

Similar considerations apply to the schedules of rates to high tension consumers. Aside from the city, there were nine customers taking high tension current. One of these, Governor's Island, is billed under the ordinary so-called "wholesale" rate for low tension consumers. Aside from the city, there were nine customers paid by other high tension customers. The high tension rates,

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except for service to Governor's Island, are based either exclusively on a charge per kilowatt of maximum demand, or on a maximum demand charge combined with a low rate for current consumed. Two of the contracts make explicit provision for lower rates based on off-peak service. There is here a multiplicity of contracts or modifications of contracts each applying to a single customer or at most, to two or three customers. Such a situation is not satisfactory. The Commission should require the adoption of rate schedules broad enough in their application to cover classes of service rather than individual consumers. Such schedules, particularly in the case of consumers so large, should definitely be based on conditions of service, and not on the amount of annual guarantee or the size of the bill. The company should be required to file a revised schedule or schedules applicable to high tension customers in which rates and discounts based on the amount of the bill or amount of current consumed shall be eliminated and charges shall apply uniformly according to the conditions of service.

The conclusion of the Commission is that the rates of the Brooklyn Edison Company should be changed and revised to conform with the findings herein, and the discriminatory features specified should be eliminated.

In the appraisal and in the findings of the Commission in arriving at the fair value of the property, the Commission has allowed a safe margin, resolving doubts in the company's favor. Similarly, in calculating the reduction to be effected by the revised rates, in the rate of return here adopted, and the allowance for expenses, ample allowance is made for contingencies. Doubtless the decrease in profits indicated here as a result of the rate changes proposed will in a measure be offset by the increase in the company's business which the record of its growth warrants the Commission in anticipating.

In view of the rapid changes in the electrical business, the order fixing the rates should provide for a period not in excess of one year. With the valuation established, the accounts and records of the company should permit a prompt determination of any questions that may arise from the operation of the new

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rates here proposed, and for any further modifications that may be required in justice both to the company and the consumer.

These proceedings have been pending before the Commission for more than four years, during which time the company has collected excessive charges to the extent of several million dollars. For these overcharges the consumer has no redress. It is only just therefore that the new rates should go into effect at once and the company should exert every effort to expedite the introduction of the new rate schedules.

Straus, Hodge, Whitney and Hervey, Commissioners, concur.

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SALES OF ELECTRIC ENERGY FOR THE YEAR 1915—EDISON ELECTRIC ILLUMINATING
Co. OF BROOKLYN

	Monthly average number of meters	Kilowatt hours of electricity	Total price revenue	Average price per kw. hr. (cents)	Rate per kw. hr. (cents)
I. LIGHT					
Retail residence:					
First two hours' daily use..	28,215	7,699,513.7	\$953,192 53	11.081	11
Second two hours' daily use		230,739.3	18,444 17	7.994	8
Excess.....		86,148.1	3,445 92	4.000	4
Total.....	28,215	8,016,401.1	\$875,082 62	10.916	
Prepayment meters.....	197	20,779.0	2,493 23	11.999	12
Total residence.....	28,412	8,037,180.1	\$877,575 85	10.919	
Retail commercial:					
First two hours' daily use..	22,267	17,677,622.3	\$1,941,730 31	10.984	11
Second two hours' daily use		7,225,699.2	577,523 26	7.993	8
Excess.....		8,051,121.5	322,108 80	4.001	4
Total.....	22,267	32,954,443.0	\$2,841,362 37	8.622	
Breakdown.....	29	126,239.5	12,924.95	10.238	
Total commercial.....	22,296	33,080,682.5	\$2,854,287 32	8.628	
Advertising.....	344	1,074,204.7	\$62,763 32	5.843	(1)
Total light.....	51,052	42,192,067.3	\$3,794,626 49	8.994	
II. POWER					
Maximum demand:					
First 25 hours' monthly use	{ 5,101	4,541,645.3	\$453,748 55	10.101	10
Second 25 hrs.' monthly use		3,349,542.2	167,496 03	5.001	5
Excess.....		12,039,542.5	320,165 56	2.659	3
Total.....	5,101	19,930,730.0	\$946,410 14	4.748	
Breakdown.....	8	169,481.8	8,886 37	5.243	
Total maximum demand.	5,109	20,100,211.8	\$955,296 51	4.753	
Auto charging.....	7	109,424.9	4,712 92	4.307	10, 5, 3
Retail power.....	110	38,372.1	4,457 22	11.616	11, 8, 4
Retail power (including break- down.....	15	44,543.4	2,952.53	6.628	10, 5
Total power.....	5,231	20,292,552.2	\$967,419 18	4.767	
III. GENERAL (large contracts)					
Wholesale (guarantee, \$2,400 yearly).....	669	5,583,432.7	\$317,540 47	5.687	6, 5, 4
Max. demand (guarantee, \$2,400 yearly).....	223	7,096,729.0	245,111 33	3.454	10, 5, 3
Max. demand (guarantee, \$6,000 yearly).....	16	733,669.7	21,376 00	2.914	10, 5, 3
Max. demand (guarantee, \$10,000 yearly).....	11	1,548,435.0	41,238 96	2.663	10, 5, 3
Rate "B," low tension (guaran- tee, \$3,360 yearly).....	100	22,602,749.7	434,979 71	1.924	(2)
Untransformed A. C. ("non- peak rider").....	1	4,510,000 0	77,931 66	1.728	(2)
Untransformed A. C. ("limited hour service").....	3	10,162,401.0	104,563 89	1.029	(2)

1 Rates vary with style of lamp and type of service.
2 Obsolete rate; cancelled June 15, 1914.
3 See Rate "B" schedule of rates, appendix I.
4 Guarantee, \$24,000 a year. (See untransformed alternating current, schedule of rates, appen-
dix I.) The single customer under this form of contract is J. N. Robins Dry Dock & Repair Co.
(Exhibit 265.)
5 Guarantee, \$50,000 a year. (See Rate "C," schedule of rates, appendix I.) The only customer
under this form of contract is American Manufacturing Co. (Exhibit 265.)

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SALE OF ELECTRIC ENERGY FOR THE YEAR 1915—EDISON ELECTRIC ILLUMINATING Co., OF BROOKLYN.—Continued.

	Monthly average number of meters	Kilowatt hours of electricity	Total price revenue	Average price per kw. hr. (cents)	Rate per kw. hr. (cents)
Untransformed A. C. ("high load factor")	5	12,892,800.0	135,141 20	1.048	(9)
Untransformed A. C. (railroad).	1	1,943,000.0	25,684 37	1.322	(9)
Fire alarm	.....	.....	152 81	.....	(9)
Miscellaneous	18	154,079.6	6,390.43	4.147	.....
Total general	1,047	67,227,296.7	\$1,410,110 83	2.098	.....
IV. MUNICIPAL					
Street lamps	.....	10,136,187.2	\$495,211 48	4.886	
Bridges	13	759,193.4	23,005 76	3.030	
Buildings	379	1,594,981.9	113,883.82	7.140	(10)
Total light	392	12,490,362.5	\$632,101 06	5.061	
Power (buildings)	199	592,046.0	33,582.02	5.672	(10)
Power (fire and pump stations)	9	1,203,616.0	57,977 68	4.816	
Total municipal	600	14,286,024.5	\$723,660 76	5.066	
Grand total	57,930	143,997,940.7	\$6,895,817 26	4.789	

⁶ Three customers (Bay Ridge Ice Co., India Wharf Brewing Co. and Reid's Ice Cream Co. at Exhibit 265) — at rate of \$80 a year for each kilowatt of maximum demand, guarantee, \$12,000—year; one customer (Tidewater Paper Mills — Exhibit 265)— at rate of \$70 a year for each kilowatt of maximum demand, guarantee, \$45,000 a year; (see Rate " D," schedule of rates, appendix I) Also one customer at rate of \$60 and \$52 a year for each kilowatt of maximum demand. (See East River tunnel construction, schedule of rates, appendix I.)

⁷ Guarantee, \$10,000 a year (see schedule of rates, appendix I). The only customer under this form of contract is the Manhattan Bridge Three-Cent Line.

⁸ \$15 for service connection and an additional energy charge of \$1 per month for each year circuit.

⁹ Number of meters for December.

¹⁰ Uniform lighting rate, 8 cents per kw. hr.; uniform power rate, 6 cents per kw. hr. Wholesale rate for light and power, without maintenance, 6, 5, 4 and 3 cents.

In the Matter of the Complaint of MANHATTAN BRIDGE THREE CENT LINE against THE BROOKLYN AND NORTH RIVER RAILROAD COMPANY—Route, Service and Rates of Fare between the Termini of the Manhattan Bridge

Case No. 2063

(Public Service Commission, First District, November 29, 1916)

Determination of the Commission—operation of bridge locals and through cars over Manhattan bridge—resettlement of order to conform to opinion.

The opinion previously adopted by the Commission in the case herein requiring the through operation by the respondent of all cars over the

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Manhattan bridge to Fulton street, Brooklyn, cannot be altered upon the additional evidence presented at the rehearing, but the order entered pursuant thereto will be resettled to conform to the opinion and to provide that the respondent discontinue (1) carrying passengers from Manhattan beyond the Brooklyn terminal of the Manhattan bridge for less than five cents; (2) carrying passengers from Brooklyn east of the Manhattan bridge to Manhattan for less than five cents; and (3) terminating the operation of any cars at either terminal of the Manhattan bridge.

On June 1, 1916, the Commission adopted an opinion of Commissioner Hayward in Case No. 2063, directing the Brooklyn and North River Railroad Company to cease certain practices in connection with the operation of cars over the Manhattan bridge, which were in violation of the provisions of its franchise. The order entered by the Commission on the same day was at variance with the opinion adopted, in that the second clause of the order prohibited the company from carrying three cent passengers from any point west of the Manhattan terminal of the Manhattan bridge to the Brooklyn terminal of said bridge.

By petition dated July 6, 1916, the Brooklyn and North River Railroad Company requested a rehearing, which was granted by an order entered July 13, 1916. After the rehearing held on July 27, 1916, the Commission adopted on November 29, 1916, another opinion of Commissioner Hayward confirming his previous opinion in the case and entered an order resettling the previous order so as to conform to the opinion adopted. The order as amended provided as follows:

“(1) That the Brooklyn and North River Railroad Company forthwith discontinue receiving passengers at the Manhattan terminal of the Manhattan bridge and at points west thereof and transporting such passengers to any point in the borough of Brooklyn beyond the Brooklyn terminal of the Manhattan bridge for a rate of fare less than five cents for one continuous ride.

“(2) That the Brooklyn and North River Railroad Company forthwith discontinue receiving passengers at any point in the borough of Brooklyn east of the Brooklyn terminal of the Manhattan bridge and transporting such passengers to the Manhattan

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terminal of the Manhattan bridge or to any point west of said Manhattan terminal at a rate of fare less than five cents for one continuous ride.

“(3) That the Brooklyn and North River Railroad Company discontinue terminating the operation of any of its cars at the terminal of the Manhattan bridge in borough of Manhattan or at the terminal of the Manhattan bridge in the borough of Brooklyn, to wit, the intersection of Bridge street and Flatbush avenue extension.”

Arthur DuBois, for the Commission.

James L. Quackenbush, by Arthur G. Peacock and Chas. L. Woody, for the Brooklyn and North River Railroad Company.

Almet Reed Latson, for the Manhattan Bridge Three Cent Line.

HAYWARD, Commissioner.—After re-examination of the record in this proceeding, including the petition for rehearing and the transcript taken at the rehearing, the Commission does not find sufficient ground for altering the general conclusions reached in the previous opinion. On the contrary, a statement of additional facts would support the opinion already expressed.

However, the order entered in this proceeding on June 1, 1916, did not conform to the conclusions of the opinion approved by the Commission on the same day, in that it prohibited the Brooklyn and North River Railroad Company from receiving passengers for transportation between a point in Manhattan and the Brooklyn terminal of the Manhattan bridge at a fare of less than five cents.

This, our previous opinion held, was not prohibited by the franchise of the Brooklyn and North River Railroad Company and our further examination into the question does not alter the general conclusion.

An order should therefore be entered modifying the original order of June 1, 1916 so as to direct as follows:

(1) That the Brooklyn and North River Railroad Company

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forthwith discontinue receiving passengers at the Manhattan terminal of the Manhattan Bridge and at points west thereof and transporting such passengers to any point in the borough of Brooklyn beyond the Brooklyn terminal of the Manhattan bridge for a rate of fare less than five cents for one continuous ride.

(2) That the Brooklyn and North River Railroad Company forthwith discontinue receiving passengers at any point in the borough of Brooklyn east of the Brooklyn terminal of the Manhattan bridge and transporting such passengers to the Manhattan terminal of the Manhattan bridge or to any point west of said Manhattan terminal at a rate of fare of less than five cents for one continuous ride.

(3) That the Brooklyn and North River Railroad Company discontinue terminating the operation of any of its cars at the terminal of the Manhattan bridge in the borough of Manhattan or at the terminal of the Manhattan bridge in the borough of Brooklyn, to wit, the intersection of Bridge street and Flatbush avenue extension.

It is not our function to indicate the methods which shall be employed by the Brooklyn and North River Company to comply with the obligations which is assumed under its franchise and the order of this Commission, and we shall assume that upon the entry of the order upon this rehearing the Brooklyn and North River Company will adopt effective means to prevent three cent passengers from being carried beyond the Brooklyn terminus of the bridge.

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In the Matter of the Complaint of the TAX PAYERS ALLIANCE OF
THE BRONX against THE NEW YORK CENTRAL RAILROAD
COMPANY

Case No. 2148

(Public Service Commission, First District, December 6, 1916)

Rates — railroad corporations — the commutation rates on monthly tickets between The Bronx and Woodlawn held to be reasonable — complaint dismissed.

Upon a complaint of the Taxpayers Alliance of the borough of The Bronx that the commutation to Woodlawn of five dollars and ninety cents per sixty-two trip tickets good for one calendar month was excessive and recommending that the sixty-two trip tickets at the above rate be made valid for two calendar months or that monthly tickets at said rate be purchasable any day of the month, *held*, that as rates to Woodlawn are not higher than to other places on the same or other railroads at the same distance, they are not excessive; that bi-monthly tickets for the same number of rides and the same prices as the monthly ticket would take the service out of the commutation class and would establish a low wholesale ticket rate; and that because of the short ride to Woodlawn and the necessity to quickly identify said tickets the rule of issuing monthly tickets for the calendar month should not be changed and the complaint should be dismissed.

The proceeding arose out of a complaint of the Taxpayers Alliance of the borough of The Bronx against the commutation rates of the New York Central Railroad Company to Woodlawn, and was started by an order entered by the Commission on October 19, 1916, directing a hearing in the matter. Hearings were held on October 30 and November 9, 1916, and on December 6, 1916, the Commission adopted an opinion of Commissioner Hodge, and entered an order pursuant thereto, dismissing the complaint.

Arthur DuBois, for the Commission.

C. W. Schmidtke, for the Taxpayers Alliance of the borough of The Bronx.

F. L. Wheeler, for the New York Central Railroad Company.

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HODGE, Commissioner.—The petition of the Taxpayers Alliance of The Bronx asked the New York and Harlem Railroad Company (New York Central Railroad Company) to extend the period of time in which to present monthly commutation tickets from one to two months and that such tickets may be purchased any day of the month with a possible reduction in the price. Very little evidence was presented by the complainants and their case was rested on the theory that because of the geographical situation at Woodlawn and because of the difficulty of access to rapid transit lines the Woodlawn commuters should be given a lower rate and a form of commutation different from that in force on any part of the line. Woodlawn is a little more than twelve miles from Grand Central Station. The monthly charge for a sixty-two ride commutation ticket is five dollars and ninety cents. The commutation is in the form of a card which is good for a calendar month and which is punched as used. At the expiration of the month or when the sixty-two rides have been used the card ceases to be valid. The complainants wish to have the card either good for two calendar months or to have it possible to purchase the card on any day of the month, and to be good for thirty days from purchase. The railroad company officials explained that owing to the short distance, and the difficulty of examining tickets, it was essential that the conductor be able to recognize by a glance whether a commutation ticket had or had not expired. Testimony was given showing that a very large number of commutation cards had been seized because of fraudulent use by commuters.

A comparison of the Woodlawn rate with the rates charged by the New York Central and by other railroads for about the same distance convinces me that the rate is no higher than the average rate from New York and is if anything a little below the average of many stations considered. The commutation from Jamaica on the Long Island Railroad Company to the Pennsylvania Terminal, eleven and three-tenths miles, was shown to be eight dollars. Newark, nine miles from New York, had a five dollar and sixty-five cent rate; Elizabeth, Spring Street Station, on Central Railroad of New Jersey, twelve miles, has a six dollar

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rate; Little Ferry on New York, Susquehanna and Western, twelve miles, has a five dollar and eighty-five cent rate; Passaic Park on the Erie Railroad, twelve miles, has a six dollar and fifteen cent rate; Brick Church, eleven and six-tenths miles on the Delaware, Lackawanna and Western, has a six dollar and ten cent rate.

As to the request of complainants that commutation tickets be good for sixty days, I am of the opinion that such a rule would take the service out of the commutation class. The low commutation rate is based on the principle that a regular rider who uses the road every day should secure a low rate because of the advantages accruing to the railroad from having regular users resident upon its lines, and to issue a commutation rate to a man who made a round trip every other day would be no more or less than selling a large number of tickets wholesale at a low rate. This form of transportation is offered to the public in the form of family or fifty trip tickets, though the rate is much higher than commutation rates.

The third and last request of the complainant is that the commutation tickets be issued on any day of the month desired by the rider good for thirty days from that day. Although the New York, New Haven and Hartford Railroad Company does issue a commutation ticket good for thirty days from day of application, I am convinced that the general practice is to issue a commutation for calendar months only and that in the case of the New York Central Railroad the shortness of the ride and the necessity for quick identification of the cards is sufficient reason for the rule as to the beginning of the commutation period. The New York, New Haven and Hartford Railroad Company does no passenger commutation business within the city of New York and the conductor has ample time to examine the ticket books.

For the reasons given above I recommend the dismissal of the complaint.

Straus, Chairman, and Whitney, Commissioner, concurring;
Hayward and Hervey, Commissioners, absent.

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In the Matter of the Hearing on the Motion of the Commission on the question whether THE BROOKLYN HEIGHTS RAILROAD COMPANY, the BROOKLYN, QUEENS COUNTY AND SUBURBAN RAILROAD COMPANY, the CONEY ISLAND AND GRAVESEND RAILWAY COMPANY, THE CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, the NASSAU ELECTRIC RAILROAD COMPANY, the SOUTH BROOKLYN RAILWAY COMPANY and the BRIDGE OPERATING COMPANY should be required to purchase or provide additional surface cars

Case No. 2097

(Public Service Commission, First District, December 13, 1916)

Street railroad corporations — insufficiency of cars.

Street railroad corporations — standards of service — adequate service required by law.

Street railroad corporations — standards of service — additional cars required for increasing traffic.

Street railroad corporations — standards of service — increase of cars unwarranted by traffic — remedy by adjustments in operation.

Street railroad corporations — cars of — the number of cars should include a margin for retirement, for repairs and for reserve.

Street railroad corporations — cars of — provisions must be made for the maximum rather than the minimum demand required.

Street railroad corporations — cars of — small cars unsuited to metropolitan operation.

Street railroad corporations — standards of service — adequate service not dependent upon rates of return.

Street railroad corporations — standards of service — overcrowding must be guarded against.

Street railroad corporations — regulation of service — health ordinances not proper regulating mediums.

Street railroad corporations — regulation of service — hygienic condition of cars as to heating and ventilation subject to health regulation.

Street railroad corporations — standards of service — use of larger cars to prevent overcrowding.

Street railroad corporations — standards of service — inadequacy of the number of cars furnished — 250 additional cars required.

Street railroad corporations — type of cars to be used — large center entrance cars to be installed.

Street railroad corporations — distribution of new cars.

Street railroad corporations — additional cars required — entry of order.

A condition of overcrowding which persists when all the cars fit for operation are in use, is attributable mainly to the insufficiency of equipment.

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While the Commission has ample authority to order the purchase of new cars, the duty of providing adequate service continues under the law, and the entry of an order is not to be construed as establishing a precedent that said duty does not exist in the absence of an order.

An increase in the number of closed cars on the lines of the respondents from 1823 in 1908 to 1943 in 1915 to meet an increase in the number of passengers carried during the same period from 274,766,791 to 354,700,113 indicates that the additions made to the accommodations have not kept pace with the requirements of increased traffic, especially since the service was already in 1908 the subject of repeated complaint and criticism.

More frequent operation of cars, limiting points of operation to points of maximum load and substitution of cars of greater capacity may remedy a disproportionate increase of cars to traffic.

A margin of 4.8 per cent of cars over rush hour operation is inadequate to meet the exigencies of service, and efficient passenger requirements should provide for a margin of 8 per cent to be kept in reserve for repairs and emergencies, the requirement herein being at least thirty additional cars of fifty-eight passenger capacity for the purposes of reserve.

The duty of a street railroad to provide adequate service is not discharged by furnishing sufficient means for accommodating the traffic actually transported, but it must be prepared to meet the reasonable requirements of the immediate future, and make provision for the maximum demand rather than for the minimum demand.

It appeared that the respondents had 90 cars with a seating capacity of only twenty-four to twenty-six passengers each and 511 cars with a seating capacity of thirty passengers each. *Held*, that the former type of cars has become obsolete for metropolitan operation, that congestion thereon is most frequent and constitutes during the winter a hygienic menace, while the latter type is also too small for Brooklyn conditions and should be gradually replaced.

The contention of the respondents that adequate service cannot be supplied because a proper rate of return is not allowed for that kind of service cannot be sustained as that would reverse the existing law that a fair rate of return is predicated upon adequate service, and that adequate service is a positive duty not dependent upon the ability to earn a fair rate of return on the investment.

The operation of surface cars during rush hours with standing passengers of from 60 to 100 per cent of seating capacity is not approved, and excess loading has not by long continuance ripened into a prescriptive right so as to relieve the carrier from the duty of safe-guarding the health of passengers against the deleterious effects of overcrowding.

Health ordinances which limit the number of passengers on a car without providing facilities for those left off regulate the public and not the carriers, causing great inconvenience to those compelled to wait an unreasonable length of time, and the proper remedy is to compel the carriers to provide additional facilities so that all may be transported with a fair degree of comfort and expedition.

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Undue attention to the proper heating and ventilation of cars, which affect the health of all passengers whether seated or standing and are proper subjects of health regulation, ignores the hygienic welfare of said passengers.

The contention of the respondents that traffic congestion and track layout at Borough Hall and on the Williamsburg bridge will not permit of increase in the rush hour service cannot be sustained in view of the fact that the respondents operate but 101 of the large cars with a seating capacity of fifty-eight passengers each, for if an additional number of such cars were installed a substantial improvement would be effected at congested points and the displaced cars could be operated on lines where no physical limitations exist.

While the opening of new rapid transit lines will shift the tides of travel and relieve the pressure on some surface line, the respondents are not justified in their expectation that such a decrease in surface traffic will occur as to stop overcrowding. Without attempting, however, to eliminate standing passengers during rush hours, and having in mind that a smaller number of the new type cars will replace the obsolete cars to be retired, the Commission will require that a minimum of 250 additional cars be provided.

The new cars to be installed should be of the large center entrance type with a seating capacity of fifty-eight passengers each, as such cars tend to decrease the number of accidents and effect economy of operation.

The total number of cars to be acquired should be apportioned among the respondents in proportion to the number of additional cars required for the purpose of providing seats for passengers.

An order should be entered requiring the purchase of 250 additional surface cars for operation during the season of 1917-1918, but not later than February 1, 1918.

Hearing closed June 9, 1916. Opinion adopted December 13, 1916.

This proceeding was started by a resolution adopted May 4, 1916, directing a hearing to determine whether the companies in the Brooklyn Rapid Transit System operating surface cars should be required to purchase additional closed cars for winter operation. The hearings were concluded on June 9, 1916, and on December 13, 1916, Commissioner Whitney presented an opinion recommending the entry of an order to require the purchase of 250 additional surface cars, which was unanimously adopted.

The form of the order to be entered was referred to Commissioner Whitney for settlement after conference with the companies.

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The further facts in the matter are set forth in the opinion adopted.

Harry M. Chamberlain, for the Commission.

D. A. Marsh, for the Railway Companies.

Cornelius M. Sheehan, for the Allied Board of Trade of Brooklyn.

WHITNEY, Commissioner.—This is a proceeding to inquire whether the street railroad carriers of the Brooklyn Rapid Transit System operating lines in the borough of Brooklyn should be required to provide additional cars for winter operation. During the summer season the use of open cars, as well as closed cars, enables the operation of a greater number than that available during the winter season. As the companies utilize during the rush hours all the cars fit for operation, the present conditions of overloading and inadequate service are attributable mainly to the insufficiency of the equipment used.

In an earlier proceeding before this Commission, Case No. 1438, to which all the companies of the present system, excepting the Coney Island and Brooklyn Railroad Company which was not then a constituent of the system, were parties, the Commission on January 26, 1912, made an order requiring the companies to purchase or provide one hundred new cars suitable for fall and winter service. Matter of Additional Cars on Brooklyn Lines, 3 P. S. C. R. (1st Dist. N. Y.) 37. This was not the maximum number which the evidence at that time showed to be necessary, but the Commission then pointed out and now repeats that: "The Commission undoubtedly has ample authority to order the companies to purchase new cars. However, the duty of providing adequate equipment rests primarily upon the companies under the law, and unless excused therefrom they should provide the necessary equipment for adequate service without any order of the Commission. The passage of this order, therefore, must not be regarded as establishing a precedent under which the com-

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panies may claim that they are relieved of that duty in the absence of such an order."

Notwithstanding the opinion of the Commission, the companies appear to have made practically no additions beyond those ordered by the Commission.

Subsequently, the Commission discontinued further proceedings in Case No. 1438, upon the ground that "all the undetermined matters" involved in that proceeding were being considered by the Commission in other proceedings. The instant proceeding, was, therefore, instituted by the Commission for the purpose of further investigation.

The evidence in this case shows that the companies have 1943 closed surface cars, with the following seating capacity:

No. of Seats	No. of Cars
58.....	101
56.....	1 Articulated Car
48.....	451
38.....	12
36.....	82
34.....	553
32.....	141
30.....	511
26.....	82
24.....	8
12.....	1 Parlor Car

1943

This difference in car capacity should be noted because it has an important relation both to the existing service and to the service which the companies could and should provide.

In 1911, the companies in this proceeding had 1841 cars, whereas they now have 1943. The number of passengers carried in 1915 was 14.87 per cent greater than the number carried in 1911. Had the number of cars increased in the same ratio as the number of passengers, the companies should have added 273 cars

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of thirty-seven passenger capacity or 172 cars of fifty-eight passenger capacity. By the time cars could be obtained, if ordered now, the requirements on this score alone would justify the additional cars ordered herein. There has been a steady increase in the riding on the Brooklyn surface lines coincidently with growth in the population.

The increase in traffic on the Brooklyn surface lines from 1900 to 1915, inclusive, is shown by the following table:

Year	Brooklyn Surface
1900	204,106,397
1901	209,119,668
1902	216,594,408
1903	223,433,771
1904	233,184,407
1905	242,780,611
1906	265,204,811
1907	262,460,253
1908	274,766,791
1909	275,038,827
1910	289,308,085
1911	305,977,350
1912	322,321,981
1913	345,987,401
1914	351,905,284
1915	354,700,113

The number of closed cars controlled by the Brooklyn Transit System including the Coney Island and Brooklyn Railroad Company, during the period from 1908 to 1915, inclusive, has been as follows:

Year	No. of Closed Cars
1908	1823
1909	1823
1910	1841
1911	1841
1912	1841
1913	1943

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Year	No. of Closed Cars
1914	1943
1915	1943

It appears, therefore, that the percentage of increase in traffic has been far greater than the percentage of increase in cars necessary to transport the traffic, and, unless the facilities afforded for the traffic transported during the year 1908 were in excess of the requirements, the additions made to the accommodations have not kept pace with the requirements of increased traffic. It is an historical fact that the accommodations on the surface railroad lines in Brooklyn, during the year 1908, were not in excess of the needs of the time, as the service on the surface as well as on other lines in Brooklyn was, during that period, the subject of repeated complaint and criticism.

It does not, however, follow that the number of cars should increase in exact proportion to the increase in the number of riding passengers. More frequent operation of cars might accommodate in part the traffic increase. Limiting points of operation where the maximum operation has been reached may prevent an increase in the number of cars, although the situation may be remediable through the substitution of cars of greater capacity.

There are three principal elements to be considered in reaching a determination as to whether adequate service is being rendered, and, if not, what improvement should be made. The first is the sufficiency of the number of cars to provide comfortable accommodation for the passenger traffic actually transported or offered for transportation, including the further element of capacity of the cars. The other elements are the frequency of operation and limitations imposed by maximum points of loading and traffic movement.

Wear and tear of equipment is an unavoidable incident of street railroad operation, as it is of all other utility service, necessitating temporary retirement of cars from service while repairs are effected. Similarly, liability to occasional failure of car mechanism during the strain of operation to which equipment is subjected, especially in the rush hour periods, necessitating prompt

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substitution of cars, must also be taken into account. A large system cannot be operated with such nicety that an emergency may not arise requiring the use of equipment for the purpose of replacing other equipment accidentally rendered unserviceable. No matter how well maintained equipment may be, in a large system like that under consideration the retirement of cars for repairs must be regular, but in an efficient system the percentage will be almost constant. This feature of railroad operation necessitates that actual passenger requirements shall include provision for a margin of equipment to allow for such inspection and repair. According to the testimony in this case, the companies now operate during the rush hour period 95.2 per cent of their total number of cars leaving a balance of 4.8 per cent only for repairs and reserve. This reserve the Commission considers insufficient and is considered by the companies as a very narrow margin. The incidents and exigencies of operation must be taken into account in rendering reasonable and adequate service. The Commission is of the opinion that 8 per cent of the total number of cars used is a safe margin to be kept in reserve for repairs and emergencies. Upon the basis of 1943 cars now operated, the companies should provide sixty-two additional cars of thirty-seven passenger capacity or thirty-nine cars of fifty-eight passenger capacity to allow such 8 per cent reserve. If the total number of cars to be operated be increased, the reserve would correspondingly increase. However, the Commission finds that at least thirty additional cars of fifty-eight passenger capacity should be provided for the purposes of reserve.

The companies contemplate the opening of several new surface lines, which the companies' superintendent of transportation estimates will require additional cars as follows:

Eighth Avenue Line.....	8 cars
West End Line	10 cars
Metropolitan Avenue Extension.....	4 cars
Ridgewood-Fresh Pond Road Extension.....	20 cars
<hr/>	
Total	42 cars
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The deficiency in the reserve and the existing overloading on lines indicate that the companies are not prepared to meet the service needs on the new or additional lines. The duty of a street railroad to provide adequate service is not discharged by furnishing sufficient means for accommodating the traffic actually transported by it, but the street railroad must be prepared to meet the reasonable requirements resulting from the development or growth of the community which it serves. In a metropolis in which the companies have been operating for many years and which has grown so rapidly in population and in transportation needs as has the borough of Brooklyn, a lack of provision for the needs of the immediate future cannot but result in failure of discharging the positive duty of the street railroad carriers to render adequate service as of the time when the service requirements exist. Even if conditions be fluctuating, reasonable provision should be made for the maximum demand rather than for the minimum demand.

The companies now operate 1389 cars with a seating capacity of from twenty-four to thirty-eight passengers each, as against 101 cars of a capacity of fifty-eight passengers each. Of the total number, ninety have a seating capacity of twenty-four to twenty-six passengers each. Counsel for the companies asserts that aside from the economy in operating the small cars, their operation during the non-rush hours would have the advantage of affording more frequent service. The Commission finds that the type of cars with a seating capacity of only twenty-four to twenty-six passengers each has become obsolete for operation on the street railroads in the borough of Brooklyn, having regard for the amount of passenger traffic and the density of population in the areas which they serve. This type of car is unsuited to the needs of the patrons of the companies in that portion of the greatest metropolis in the country which alone has a population of over 1,800,000. Overloading and congestion on this type of cars is most frequent, and during the winter period when the heating and ventilating of the cars are difficult, crowding on these cars is an hygienic menace to the passengers. These cars are inadequate for the traffic and population which they are to serve and should be retired from service. The Commission also seriously questions the class of 511

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cars of seating capacity of thirty each as not now adequate for Brooklyn conditions and therefore indicates that progress should be made in the gradual replacement of these, although the Commission does not ask that all of this class be now replaced.

Observations made by the transit bureau of the Commission on the principal lines operated by the companies during rush hour periods show excessive loading in the rush hours, in some cases of more than 100 per cent during an interval of an hour. The correctness of the counts taken by the transit bureau of the Commission was not questioned by the companies, but was confirmed by the testimony of the companies' superintendent of transportation. The latter testified that the schedules for the evening rush hours were based on an average overload of from 50 to 60 per cent and even more.

In the course of the hearing a comparison was suggested between the obligation of an electric light or other utility to render adequate and complete service at the peak load or maximum demand and that of a street railroad to render adequate service at peak load periods, since both are given special rights and privileges and both undertake adequately to serve the public. Counsel for the companies makes this response: "We said then and we repeat now that the railroad companies cannot do so because they are not allowed a proper return for that kind of service." This implies the proposition that adequate service by a carrier is predicated upon a proper return. It reverses the existing law, which is that a fair return is predicated upon adequate service. *Public Service Com. v. Puget Sound T. L. & P. Co.*—Wash.—P. U. R. 1915 B, 799, 807; *Re Metropolitan Coach Co.*—D. C.—P. U. R. 1915 D. 740. In the former case, the Washington Public Service Commission said:

"To furnish adequate and sufficient service facilities to enable it to properly, expeditiously, safely, and properly transport passengers is the primary duty of the respondent. This duty is not dependent on the ability of the company to earn a return on its investment. It is the performance of this duty which entitles the respondent to a return on its investment.

"The service for which the company is entitled to receive com-

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pensation in the form of a return on its investment is the service defined by law, that is adequate and sufficient.

“ The law does not authorize the respondent to demand a return on its investment for providing a service which is 50 per cent adequate and sufficient, or anything less than 100 per cent adequate and sufficient.

“ The measure of compensation to which respondent may be entitled is not graduated according to the degree of proficiency with which it discharges its duty.

“ The law does not authorize respondent to demand one-half of a reasonable return on its investment for furnishing a service which is 50 per cent adequate and sufficient. Hence a proceeding such as this, to require respondent to provide adequate and sufficient service facilities, is not a proceeding affecting rates. It is not incumbent upon the Commission to make a valuation of respondent's property before requiring the respondent to furnish adequate and sufficient service facilities. Respondent may not defend against such requirement by showing that the particular service demanded is not profitable, and in this case it is no defense for the company to show that a particular line of its system is or is not profitable.

“ 1 Wyman, Pub. Service Corp. § 809; Platt v. LeCocq, 150 Fed. Rep. 391; New York v. Dry Dock, E. B. & B. R. R. Co., 133 N. Y. 104; 28 Am. St. Rep. 609; 30 N. E. Rep. 563; Atlantic Coast Line R. R. Co. v. North Carolina Corp. Commission, 206 U. S. 1; 51 L. ed. 933; 27 Sup. Ct. Rep. 585; 11 Ann. Cas. 398; Washington, P. & C. R. Co. v. Magruder, 198 Fed. Rep. 218.”

The duty to serve adequately is positive and the street railroad companies are not remediless when their return does not properly compensate for the service.

The companies contend, moreover, that it is a proper and reasonable standard of service to operate surface cars during rush hour periods with a standing load of from sixty to one hundred per cent. Excess loading can generally be prevented during non-rush hours but, if it cannot be avoided during rush hours, it should be minimized. The fact that a public utility persists for a long

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period in its failure to remedy conditions of inadequate or improper service creates no prescriptive right to continue them. Especially is this so where, as in this case, the number of standees frequently exceeds the standard assumed by the carrier. The matter of standing passengers in cars cannot be regulated by arbitrary percentages. Involved in it also is the vital duty of safeguarding the health of passengers against the deleterious effects of overcrowding. The percentage claimed by the companies is not recognized by regulating Commissions as proper. Matter of Georgia R. & P. Co.—Ga.—P. U. R. 1915 A. 901; West End Bus. Men's Asso. v. United R. Co.—Mo.—P. U. R. 1915 D 482, 494; Cook Co. Real Estate Bd v. Chicago Surface Lines — Ill.—P. U. R. 1915 F 578.

It is obvious that street car service in this city cannot be regulated by so-called health ordinances. These directly limit the number of passengers which may be accommodated aboard a car, and do not provide facilities for the passengers who are left off the cars. While a limited number are thus given better accommodations, the rest are denied accommodations altogether or are compelled to wait an unreasonable length of time. Such ordinances regulate the public, and not the street railroads. The traveling public must be transported to and from their homes and places of business. What is needed is not that the public shall be prevented from being transported, but that the street railroads should provide additional facilities so that all may be transported with a fair degree of comfort and with rapidity.

In discussing a "standard" of standing passengers during rush hours, sight is lost of the question of heating and ventilating street cars during the winter or inclement season. To say that a number of passengers may be admitted into a car, whether seated or standing, without relation to the methods of heating and ventilating the cars, is to ignore the hygienic welfare of the passengers. This has been a difficult problem to which the Commission has given a great deal of investigation and labor. Unfortunately, the solution of this health question has not had the attention of health authorities which it deserves.

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The companies insist that even if additional cars were acquired the rush hour service could not be increased, since the street traffic congestion and track layout in the vicinity of Fulton street and Borough Hall and also upon the Williamsburgh bridge preclude any increase.

While the places in question do limit the number of cars which may be operated through them, the evidence does not convince us that the point of saturation has been reached with the present number of cars. Not only is it feasible to operate more cars in various places where they are needed, but an increase in car capacity is also essential. But 101 of the 1943 cars now operated on the system contain a seating capacity of fifty-eight passengers each. By replacing a number of smaller cars now operated over the limiting points with cars of larger capacity, a substantial improvement would be effected. The new type of large cars used by the companies could be operated with greater despatch over the limiting points than the older type. Some of the displaced cars could be operated on other heavy lines on which there are no physical limitations as to the number of cars operated, and could perhaps be reconstructed so as to give greater capacity, and the accommodations in service could thereby be increased upon the entire system.

The inadequacy of the present service is not seriously denied by the operating companies. But counsel for the companies contends that the areas of physical limitation will be relieved by the release of cars from some of the lines as a result of new rapid transit operation, enabling the operation of more cars on lines which need additional service where track limitations now prevent, and that the operation of the rapid transit lines will result in the diminution of passengers traffic on the surface lines to such an extent as to result in the desired relief.

The companies no doubt still contemplate the continued maintenance of the percentage of overload which they have adopted as a standard for operation. The opening up of new means of travel which will be furnished by the rapid transit lines under consideration will, undoubtedly, change tides of travel and will vary the volume of travel on particular lines and sections. The new rapid

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transit lines were planned with a purpose of providing facilities for the increasing requirements. The record does not justify the expectation that such a decrease in traffic on the surface lines will occur as will eliminate overcrowding on the surface car lines. The rapid transit lines will quickly develop various parts of Brooklyn, and there will arise on the part of the augmented population a demand for transit service which will absorb all the equipment which may be released in the shifting of tides of travel.

The superintendent of transportation of the companies himself testified that about six or eight months previously he had made recommendations to the president and directors of the companies for the purchase of 100 additional cars, thus admitting that the responsible operating officials of the companies themselves realized the need for them. As he did not expect to obtain the cars in time for service during the winter of 1916-1917, and as they could not, therefore, be put into service before the winter of 1917-1918, his judgment seemed to be uninfluenced by the anticipated effect of the commencement of operation of the new rapid transit lines.

The provision which the Commission now orders the companies to make in additional cars may not eliminate standing passengers during rush hours, but the excess loading during those hours will be reduced and may be obviated where it is possible to do so. A smaller number of the new type cars may be required for replacing the obsolete cars than the number of cars to be retired. Upon these assumptions, the additional cars which the companies should now provide may be fixed at a minimum of 250 in number.

The new cars should be of the center entrance type similar to those in use on the surface lines, having a seating capacity of fifty-eight each. Although longer than the old type cars, they will facilitate operation over limiting points on the road. Experience in their operation has shown that they tend greatly to decrease the number of accidents to boarding and alighting passengers which are frequent in the operation of the other types of cars, resulting in great economy of operation. The superintendent of transportation of the companies himself favored the center entrance type of car, and testified that from the standpoint of safety of passengers they are the best.

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The total number of cars to be acquired should be apportioned among the companies in proportion to the number of additional cars required for the purpose of providing seats for passengers.

It is recommended that an order be entered accordingly requiring the purchase by the companies parties to this proceeding of a total of 250 additional surface cars and to place them in service as rapidly as possible during the season of 1917-1918, but not later than February 1, 1918.

Straus, Chairman, Hodge and Hervey, Commissioners, concurring; Hayward, Commissioner, absent.

In the Matter of the Complaint of ALBERT MORITZ and Others,
against the EDISON ELECTRIC ILLUMINATING COMPANY of
Brooklyn

Case No. 1540

(Public Service Commission, First District, December 27, 1916)

Electrical corporations — maximum demand rates — methods of determining maximum demand.

Electrical corporations — reduction of rates — modification of former order.

Upon a rehearing in the case herein the respondent contended among other things that the change ordered by the Commission in computing the maximum demand from an assumed rating of 50 per cent of the connected load in the case of residences and 70 per cent in the case of other premises to 25 per cent and 50 per cent respectively, would render uncertain the final effects of the reduction in rates from eleven cents to eight cents per kilowatt hour; also that the existing practice was satisfactory to the consumers, and that upon the payment of one dollar a customer could have his maximum demand ascertained by meter. *Held*, that while the determination of the maximum demand on the basis of the existing percentages of the connected load was unsatisfactory, and the cost of ascertaining demand by meter was prohibitive, in order to avoid delay in putting the new rates into effect it would be expedient to continue the existing system and to adjust new rates thereto.

The order entered herein on October 27, 1916, will be modified in certain respects in order to avoid litigation and delay in putting the rate reductions into effect.

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On October 27, 1916, the Commission adopted an opinion of Commissioner Hayward, and entered an order pursuant thereto in Case No. 1540, directing the Edison Electric Illuminating Company of Brooklyn to reduce the maximum rate for electricity from 11 cents to 8 cents per kilowatt hour, with lesser reductions in other rates, to change the method of computing the maximum demand rating, to substitute tungsten lamps for gem lamps and to discontinue the practice of allowing discounts under the maximum demand power rate. See 7 P. S. C. R. (1st Dist. N. Y.) 175.

By petition dated November 27, 1916, the company asked for a rehearing which was granted by order entered by the Commission on December 22, 1916, setting the hearing for the same day. Immediately after the rehearing on that day the Commission entered an order modifying the previous order as set out below.

On December 27, 1916, Commissioner Hayward filed a supplemental opinion in support of the modifying order. Upon a motion to adopt the supplemental opinion Chairman Straus, Commissioners Hayward, Hodge and Whitney voted for, and Commissioner Hervey against, adoption. In voting the following statements were made:

Commissioner Hervey: What was the effect of the change in the matter of the reduction of rates as fixed by the order in Case No. 1540 adopted December 22, 1916?

Commissioner Hayward: The saving was reduced from \$1,000,000 to \$700,000. We did not recede any from our position as to the appraisal.

Commissioner Hervey: As a matter of principle, I would not approve of the reduction. The opinion cannot be right from my point of view. I stated to the chairman at the time the Commission was in conference with the Edison Company, that the order having been issued by the Commission it should not enter into any compromise in respect to that order. We should let it go through to a finish, even if the company served a writ of certiorari to review the order. There should be no compromise after the order was adopted. That is my point of view of the matter. I would not consider the merits of the case as to this opinion, or any other consideration, except as a matter of principle, that is, not to

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compromise on an order of the Commission. We are authorized to do this thing under a certain procedure and we should carry out that procedure. There is an implication that either the order was improper and incorrect when first adopted, or else that other consideration had entered in, in case the order is modified or a compromise is accepted.

Commissioner Hodge: My idea is, we will save more money for the taxpayers by making this compromise than we would if the company commenced certiorari proceedings to review the order, which would probably mean three years in the courts and three years at \$700,000 a year would amount to \$2,100,000.

Commissioner Whitney: The original order required the company to file a schedule, to be approved by the Commission, and that necessarily presupposed that there need be conferences on the matter of that schedule before it could be filed and approved by the Commission, and that was done and the Commission did then, by subsequent action, approve a schedule of rates, which makes it possible for the company to accept the schedule effective by January 1, 1917.

The order entered on December 22, 1916, and the supplemental opinion adopted on December 27, 1916, are as follows:

"An order having been made in this case on October 27, 1916, and the Edison Electric Illuminating Company of Brooklyn having presented its petition verified November 27, 1916, praying that a rehearing be had in respect to said order and said petition having been granted and said rehearing having been had, it is

"Ordered that said order of October 27, 1916, be and the same hereby is abrogated; and it is

"I. Further ordered that on and after January 1, 1917, and for a period of twelve months thereafter the maximum price to be charged by said Edison Electric Illuminating Company of Brooklyn for electric service, exclusive of the installation and renewals of electric lamps, shall be eight cents per kilowatt hour.

"II. The Commission being of opinion that the rates or charges of said company are unjust, unreasonable, unjustly discriminatory and unduly preferential, it is

"Further ordered that on and after January 1, 1917, and for a

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period of twelve months thereafter the general lighting rates or charges shall be as follows:

“ 1. Eight cents for the first two hours' average daily use of the maximum demand; six cents for the second two hours' average daily use of the maximum demand; and five cents for the excess over four hours' average daily use of the maximum demand. Said maximum demand, except when determined by meter, shall be assumed to be not in excess of 50 per cent of the consumer's connected load in the case of residence consumers, and not in excess of 70 per cent of the connected load for other consumers, provided, however, that said maximum demand shall not in any case be assumed to be less than one and one-half kilowatts.

“ 2. Said company shall not furnish to its customers gem lamps or other lamps of an efficiency of less than one and one-quarter watts per candle power and the charge for such lamps shall be based on the cost to the company. The maximum price to be charged for the installation and renewal of incandescent lamps furnished by said company in connection with the supply of current for lighting under any lamp service agreement shall be one-half of one cent per kilowatt hour. If tungsten lamps of smaller capacity than fifty watts are furnished by said company under such lamp service agreement it shall be entitled to make an extra charge therefor but not more than the additional cost of the installation and renewal of such smaller lamps.

“ III. Further ordered that on and after January 1, 1917, and for a period of twelve months hereafter the rates or charges for current used for power under the maximum demand contract shall be as follows: eight cents per kilowatt hour for the first hour's average daily use of the maximum demand; five cents per kilowatt hour for the second hour's average daily use of the maximum demand; and three cents per kilowatt hour for all current in excess of two hours' average daily use of the maximum demand. Said maximum demand, except when determined by meter, shall be assumed to be not in excess of 80 per cent of the connected load. No discount shall be allowed by said company under said contract.

“ IV. Further ordered that before January 1, 1917, said com-

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pany shall issue, file and post a schedule or supplement to carry into effect the provisions of this order, said schedule or supplement to become effective January 1, 1917.

“ V. Further ordered that on or before July 1, 1917, said company shall submit for the approval of the Commission a complete tariff schedule for all electrical service effective July 1, 1917, which schedule shall be in accordance with the provisions of this order and the decision in this case.

“ VI. Further ordered that this order shall take effect forthwith and shall continue in force until changed or abrogated.

“ VII. Further ordered that on or before December 27, 1916, at noon said company shall notify the Commission whether this order is accepted and will be obeyed.”

Henry H. Whitman, Adna F. Weber and Harry G. Freidman,
for the Commission.

W. F. Wells and Paul R. Atkinson, for The Edison Electric
Illuminating Co. of Brooklyn.

Commander Albert Mortiz, the complainant, in person.

HAYWARD, Commissioner.— On November 27, 1916, the Edison Electric Illuminating Company of Brooklyn filed a petition praying for a rehearing in the proceedings which had terminated in the order of the Commission dated October 27, 1916, reducing the rates for electricity in Brooklyn. This petition was granted and a rehearing was duly held on December 22, 1916. The petition raised a number of objections to the findings of the Commission and the details of the rate schedules prescribed. The officers of the company further asked that consideration be given to developments since the record was closed which gravely affected the company's business such as the great increase in the cost of coal and the general rise in the price of all materials and supplies, the increase in the rates of wages accompanied by a reduction in hours of

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labor, greatly increased tax assessments, the reduction in the rates for city lighting and the uncertainties introduced in the situation by business stimulated by the war, the continuance of which could not be counted on.

It is urged that the company is under the necessity of making extensive capital expenditures in order to provide adequate service, and to invest large sums which will not bring immediately to the company a fair return on the outlay. The officers of the company expressed the apprehension that it would prove difficult in view of the valuation found and the drastic reductions in the rates ordered, to enlist capital for necessary additions. Investors giving attention only to the figure of the final valuation of \$22,000,000 would not appreciate the fact that according to the Commission's own determination the property of the company represented outlays of approximately \$30,000,000 and that though \$7,000,000 was deducted for depreciation on account of lack of newness, property to this amount was still in existence and in the service of the consumer.

With reference to the schedules ordered, it was urged that these should conform more closely to the present practices of the company, with which its customers were familiar. The company's representatives stated that certain features of the present schedule, with reference to the rating of installations, while perhaps discriminatory in form, were not discriminatory in purpose, and did not impose an unjust burden on the small consumer, if account is taken of the relative larger cost per kilowatt hour involved in serving the smaller consumer. Any change in the fundamental features of the schedule introduces uncertainty in the calculations as to the effect of the new rates, and would seriously interfere, if not render it impossible, to put reduced rates into effect without considerable delay.

The company placed itself on record as willing to discontinue the general practice of issuing gem lamps to consumers and to substitute the fifty-watt Mazda lamp as the standard and to charge for lamps on the basis of cost, either in a fixed price per lamp, or in a kilowatt-hour charge in connection with the service.

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In regard to the power schedule, the company's officers expressed their willingness to abolish the discounts as required by the Commission, but proposed that in view of the low average rate now charged for current for power purposes, the rates for the primary and secondary steps be applied to one hour's daily use of the maximum demand, or thirty hours per month, instead of twenty-five as at present. In order to obviate criticism, they further suggested that, except where determined by meter, the maximum demand should be assumed to be not more than 80 per cent of the connected load for all installations under ten horse power in place of the present schedule of 85 per cent, where one motor is used and 75 per cent where more than one motor is used. It is the intention of the company as soon as practicable to install maximum demand meters on large power installations.

With reference to the wholesale contracts, the company submits that in view of the importance of these contracts and the large amount of revenue involved under each one of them, it is impossible to make a revision of these rates in accordance with the Commission's recommendations in thirty days, and that six months should be allowed for a thoroughgoing study and the formulation of schedules to be presented for the Commission's approval.

The company's representatives expressed their desire to avoid costly and protracted litigation and their willingness to make substantial reductions in the rates and prayed the Commission so to modify the order as to enable the company to put it into effect on January first, and thus to give to the public at once the benefits of reduced rates.

The Commission in conference with the company's officers and in the formal proceedings has given due consideration to the contentions of the company and its officers. The Commission appreciates the necessity of inducing the further investment of capital in order to provide for adequate service. It does not believe, however, that there are any grounds for apprehension on the part of investors that further legitimate investment of capital will not be permitted to earn a fair return.

The representatives of the company urge that the present form

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of its lighting rate schedules should be retained because its customers are now familiar with it, and that a radical departure from it would add materially to the cost of inspection of consumers' installations in the case of the great army of small customers, and would make it impractical to put into effect new rates without delay. The present practice of rating all installations at a minimum demand of one and one-half kilowatts has the effect of applying the maximum rate to customers using ninety kilowatt-hours or less. This it contends is not unfair. Certain consumer costs are approximately the same for all customers, regardless of the amount of current used. Such expenses, sometimes spoken of as "consumer costs," form, however, relatively a greater part of the cost of serving comparatively small customers than of larger consumers, and therefore justify a higher rate per kilowatt-hour for smaller consumers, a result which is indirectly brought about by the present practice of the company.

The company further submits that the adoption of a new percentage rating for demand renders uncertain the final effects of any rates ordered. It holds that the present practice is satisfactory to its customers, and that any one aggrieved may on payment of one dollar per month have the maximum demand ascertained by meter.

The Commission does not believe the present system of computing maximum demand on the basis of percentages of connected load to be satisfactory. The cost of ascertaining demand by meter is, however, prohibitive in the case of the great mass of consumers. In order to avoid delay in putting the new rates into effect, it would seem expedient to continue its present system, and to adjust new rates thereto.

In view of all the considerations raised in these proceedings, and in the application for rehearing, and the desirability of avoiding long and costly litigation and delay, I believe that the order adopted October 27, 1916, should be modified, and the following schedules put into effect, January 1, 1917, viz.:

For Lighting

Eight cents for the first two hours' average daily use of the maximum demand.

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Six cents for the second two hours' average daily use of the maximum demand.

Five cents for the excess over four hours' average daily use of the maximum demand.

The maximum demand to be determined as at present.

For Power

Eight cents for the first hour's average daily use of the maximum demand.

Five cents for the second hour's average daily use of the maximum demand.

Three cents for the excess over two hours' average daily use of the maximum demand.

The maximum demand to be assumed to be not more than 80 per cent of the connected load.

Straus, Chairman, Hodge and Whitney, Commissioners, concurring; Hervey, Commissioner, dissenting.

In the Matter of the Hearing on the Complaint of REALTY SUPERVISION COMPANY against THE EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN as to Alleged Refusal to Extend Conjunctional Service Contract to Lessee of Buildings

Case No. 2156

(Public Service Commission, First District, December 27, 1916)

Discrimination and preferences — electrical corporations — conjunctional service is unjustly discriminatory.

Powers of Commission — reparation — electrical corporations — Commission has no power to award damages.

Refusal by the respondent to supply conjunctional service under a contract rider which would permit the pooling of the consumption of current by all the tenants of two or more adjoining buildings for the purpose of giving the lessee or owner of said buildings the benefit of a wholesale rate and the cancellation of said service rider are not improper, as the reten-

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tion of such a rider and the rendition of service thereunder are contrary to the principle of "one customer, one service, one meter," and discriminate against the small consumers who cannot pool their consumption as well as against the large consumers who have but one building, one service connection and one meter.

Even if the complaint as of a date prior to the cancellation of the conjunctional service rider were justified the Commission is not possessed of power to award damages.

This proceeding was upon the complaint of the Realty Supervision Company and was started by the adoption of a resolution on November 1, 1916, directing a hearing in the matter.

On December 27, 1916, the Commission adopted an opinion of Commissioner Hayward, who presided at the hearings and entered an order pursuant thereto dismissing the complaint.

Edward J. Crummey, for the Commission.

A. J. Levey, for the Realty Supervision Company.

M. S. Seelman and C. E. Butz, for the Edison Electric Illuminating Company of Brooklyn.

HAYWARD, Commissioner.—On October twentieth, the Realty Supervision Company complained to this Commission that its principal, Fulton and Elm Leasing Company, had been refused service by the Edison Electric Illuminating Company of Brooklyn under the so-called conjunctional service rider in the schedules of that company. This rider, which is no longer included in the company's schedules, read originally as follows:

"It is further understood and agreed that in view of the fact that the buildings enumerated in this contract are not more than 100 feet apart, and under a common leasehold (or) ownership and may be served from one service, the current required for them may be taken collectively in determining the rate to which the undersigned is entitled under this contract."

The Fulton and Elm Leasing Company is and has been the lessee of property 474 to 482 Fulton street, Brooklyn. This is a series of adjoining buildings which are separated by party

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walls in the front but have a common open space in the rear. They are handled as one building by the lessee which rents the stores on the street to various tenants.

On August sixteenth, the Realty Supervision Company, acting as agent for the Fulton and Elm Leasing Company and with the written consents of the tenants of the stores applied to the Brooklyn Edison Company for service under the above rider to the end that the consumption of all of these tenants might be pooled and a wholesale rate obtained instead of the rate in force when each tenant's consumption was billed separately.

The Edison Company refused to make the change and on August twenty-fifth filed a new schedule which eliminated the word "leasehold" from the rider, said new schedule becoming effective on September twenty-fifth. Hearings on the complaint were held before me on November sixteenth and seventeenth when it was urged by the complainant that it was unjust to discriminate as between leaseholders and owners and that the rider in question did originally and should continue to apply to the circumstances of this case. The company contended that this rider had never been intended to cover the situation here involved, and on November twentieth, filed a new schedule canceling entirely the rider in question.

By this action of the company the questions raised by complainant at the hearing are subordinated to the question of the propriety of the rider itself and whether the Commission should insist upon its retention.

There can be no doubt that this conjunctional service rider in any form is contrary to the principle of "one customer, one service, one meter," which has been insisted upon by this Commission as the only principle which will give justice to all.

In regard to the same rider which was contained in the schedule of the New York Edison Company, I said in my dissenting opinion, (6 P. S. C. R. 1st Dept. 289 at p. 306)—"I believe it to be highly discriminatory — both against the larger consumer who takes the same amount of current with very much less service, and the small consumer who cannot join with his neighbors to get a lower rate. It is plain that the person who owns numerous

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buildings, each with its service connection and its one or more meters gets a great deal by way of service and facilities that another customer, consuming a like amount of current, but all in one building and with one service, does not get.

“Moreover, this conjunctional service contract is discriminatory as against the owner or lessee of a small building which cannot be joined under such a provision. He is forced to compete with his neighbor in the same type and size of a building and is penalized in his electric light or power bill because he or his landlord does not own any other buildings in the same block and within 100 feet. If there were some appreciable difference in the cost of the service to the fortunate owner or lessee of several buildings which would come within this rider, or if the service to such owner or lessee could be rendered with appreciable economy to the companies, it would perhaps be proper that the owner of the single building should be charged more than the owner of three or four, but where the owner of several buildings receives for each building the same service as the owner of a single building, it is certainly discriminatory to allow the consumption in such buildings to be joined and the price of current reduced thereby.”

On the same grounds, I believe that the Brooklyn company has done well to cancel this rider and that it should on no account be reinstated.

This being the case the questions which were raised at the hearing become academic in so far as this Commission is concerned. Even if the situation involved was one which in August entitled complainant to service under this rider — which I seriously doubt — we would be without authority to award him damages. *Murphy v. New York Central*, 170 App. Div. 788.

I believe, therefore, that the complaint should be dismissed.

Straus, Chairman, Hodge, Whitney and Hervey, Commissioners, concurring.

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In the Matter of the Complaint against the LONG ISLAND RAILROAD COMPANY'S Service to and from New York and Westbridge

Complaint No. 14176

(Public Service Commission, First District, December 27, 1916)

Railroad corporations — service at Westbridge, Queens — adjustment of complaint.

The complaint by the Westbridge Civic League of lack of service at Westbridge by the Long Island Railroad Company and the request that all trains to and from Manhattan stopping at Forest Hills, Kew Gardens and Jamaica should also stop at Westbridge, having been adjusted by adding one daily train service in each direction, which is adequate for the traffic at Westbridge, the complaint will be deemed satisfied.

On December 27, 1916, the Commission approved a memorandum of Commissioner Hodge and, pursuant thereto, a communication of the same date to be forwarded to the Long Island Railroad Company, closing the complaint made by the Westbridge Civic League on October 17, 1916, against insufficient train service at Westbridge. No hearings were required, the matter having been adjusted by correspondence.

HODGE, Commissioner.—The correspondence relative to this complaint was referred to me by the Commission at its meeting on November twenty-ninth.

From the correspondence it would appear that there is not sufficient traffic at this station to warrant the Long Island Railroad Company complying with the request made by the Westbridge Civic League that every train to and from New York that stops at Forest Hills, Kew Gardens and Jamaica stop at Westbridge.

The report of the chief of the transit bureau under date of November sixth indicates that the total number of passengers using this station during the morning rush hour are less than a dozen. About an equal number use the station during the evening rush hour.

Since, however, there may be some truth to the contention that

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were there better train service, passengers who now walk the long distance to Kew Gardens station would use the Westbridge station, I have taken the matter up informally with Mr. C. L. Addison of the Long Island Railroad Company.

From the letter of Mr. Addison under date of December twenty-first herewith attached it will be noted that the Long Island Railroad Company agree to stop at Westbridge train No. 1723 scheduled to leave Jamaica at 8:02 A. M. and scheduled to arrive at Pennsylvania station, New York city, at 8:20 A. M., and train No. 858 scheduled to leave Pennsylvania station, New York city, at 5:33 P. M., and scheduled to arrive at Jamaica at 5:53 P. M. This change in the schedule becomes effective Saturday, December 23, 1916.

I recommend that the attached letter dated December twenty-second be sent to the railroad company and that complaint 14176 be closed.

Straus, Chairman, Hayward, Whitney and Hervey, Commissioners, concurring.

**In the Matter of the Complaint of MARGUERITE B. BURKE against
NEW YORK EDISON COMPANY as to Service Through a Sub or
Series Meter**

Case No. 2173

(Public Service Commission, First District, January 10, 1917)

Electric service corporations — the standard provision as to service from a general building — riser cannot be waived by such a corporation for an individual tenant of the building.

The New York Edison Company has no right to waive the standard provision so as to make a special arrangement in favor of an individual consumer to whom the standard provision is applicable. All consumers receiving service under the same conditions of fact are entitled to the same terms.

Schedules of all service rates must be filed with the Commission.

BY THE COMMISSION.— This complaint raises the questions (1) whether the New York Edison Company, an electrical corporation, may require a tenant in an apartment house to which electrical service is furnished through a general riser owned and con-

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trolled by the landlord, to agree to a duly filed and published provision in a service contract that "Permission having been given to, owner or lessee of the building at to use electric current of the New York Edison Company through a sub or series meter, and supplied from the general building riser, it is understood and agreed that if the company is obliged to discontinue its supply of electric current to the building for any cause the undersigned will not request the said company to supply electricity through the series meter," and (2) whether, if the tenant sign the contract, the tenant has a right to add thereto the following reservation which is not contained in the corporation's tariff schedules: "under protest, and reserving the right at any time to attack the legality of the above consent."

Under subdivision 12 of section 66 of the Public Service Commissions Law and orders adopted by the Commission on December 18, 1908, December 12, 1912, and June 22, 1916, electrical corporations are required to file with this Commission schedules showing all rates and charges made and all forms of agreement and all rules and regulations relative to rates, charges or service and all general privileges and facilities granted or allowed by such electrical corporations; and, unless the Commission otherwise orders, no change may be made except after thirty days' notice to the Commission and publication.

The New York Edison Company, therefore, has no right to waive the standard provision with regard to the supply of service from the general building riser, in the case of an individual consumer to whom such provision is applicable. The company cannot lawfully change the contract provision for an individual consumer nor accept the contract as altered, without previously filing and publishing the same so that all consumers receiving service under similar circumstances may have the benefit of it.

Moreover, the addition of the reservation by the complainant is ineffective, since the Commission has ample power under the Public Service Commissions Law, either upon complaint or upon its own motion, to determine and prescribe just and reasonable rates and charges and acts and regulations, when it appears that such rates or charges or acts or regulations are unjust or unreason-

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able or in anywise in violation of any provision of law. Pub. Serv. Com. Law, § 66, subd. 5. All contracts entered into by the company with its consumers are made in contemplation of the exercise of the regulatory power of the State. Matter of Rate Schedules of the New York Edison Company, 6 P. S. C. R. (First Dist. N. Y.) 328.

As long as the landlord owns and controls the general riser in the building, he is in a position to prevent the Edison Company from supplying any tenant with electricity from that riser. In entering into a contract with a tenant of the building, setting forth terms under which service is to be rendered, it appears to be reasonable for the New York Edison Company to make provision for the contingency of being obliged to discontinue the supply of electric current from the riser.

As the facts alleged in the formal petition of the complainant would not, if proved, warrant the relief prayed for, the complaint is dismissed.

In the Matter of the Hearing on the Motion of the Commission on the question whether the LONG ISLAND ELECTRIC RAILWAY COMPANY should be required to double-track its road on New York Avenue and Rockaway Turnpike or Rockaway Road between South Street on the north and Hook Creek on the south in the Borough of Queens, City of New York

Case No. 1799

(Public Service Commission, First District, January 17, 1917)

Order denying application for second extension of previous order.

On December 27, 1914, an order was made by the Commission in this case to extend the time of double-tracking the line of the Long Island Electric Railway Company in New York avenue, in Queens borough, between South street and Farmers avenue. The company now makes this application for a second extension. Application denied.

BY THE COMMISSION.—An order having been adopted herein on December 27, 1916, extending the time of the Long Island Electric Railway Company within which to comply with para-

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graph (3) of the order of June 12, 1914, directing the said company to double-track its line in New York avenue between South street and Farmers avenue in the borough of Queens, city of New York, and the company by communication dated January 5, 1917, having made application for a modification of said order of December 27, 1916, and the Commission being of the opinion that sufficient facts for the granting of said application have not been made to appear, it is

Ordered that said application be and the same hereby is in all respects denied.

In the Matter of the Complaint of the ELEVATOR MANUFACTURERS' ASSOCIATION against NEW YORK AND QUEENS ELECTRIC LIGHT AND POWER COMPANY as to equipping elevators with reverse phase device

Case No. 4162

(Public Service Commission, First District, January 17, 1917)

Electric light and power companies — corporation furnishing electricity not required to provide certain safety devices.

The Elevator Manufacturers' Association brought this complaint against the New York and Queens Electric Light and Power Company to ascertain whether the latter company or the user should furnish the reverse phase relay required by the Commission in the case of alternating current equipments for elevators. *Held*, that there appears to be no provision of law requiring an electric corporation to furnish such device. The objections to the schedule of the electric company requiring the user to install such device not sustained. Case closed without formal order.

By THE COMMISSION.— Complaint is made by the Elevator Manufacturers' Association as to the reasonableness of the following provision in the schedule of the New York and Queens Electric Light and Power Company, filed with the Commission under date of July 8, 1916: "Alternating current equipments for elevators should be provided with an approved reverse phase device that will prevent the operation of the elevator in the event of a reversal of either phase. This device should be included as a part of the elevator equipment."

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The Elevator Manufacturers' Association in its correspondence with the Commission states: "In protesting to the Public Service Commission, the Elevator Manufacturers' Association desire to get their opinion as to who should furnish the reverse phase relay rather than as to whether or not a reverse phase relay was to be furnished at all."

The duty of an electrical corporation to render service is qualified by its right and duty to make reasonable rules and regulations to assure the sufficiency and safety of the equipment of the consumer used in connection with his service. *Pisner v. New York Edison Company*, 170 App. Div. 647. In that case the plaintiff made application to the New York Edison Company for the supply of electric current and the company as a condition precedent to rendering service required the plaintiff to secure from the board of underwriters a certificate certifying to the sufficiency and safety of the electric equipment in his building. The plaintiff failed to secure the certificate and the company refused to supply electric current, whereupon the plaintiff brought a penalty action. The appellate court upheld the position taken and dismissed the complaint, saying: "It is true that the statute creating penalties, if read literally, makes it the unqualified duty of defendant to furnish electrical current upon application, but there must be read into the statute the right and duty to make reasonable rules and regulations to assure the sufficiency and safety of the equipment within the building to which the current is to be applied. This duty was decided, with much emphasis, by the Court of Appeals in *Schmeer v. Gas Light Co.* (147 N. Y. 529, 536). Speaking of the defendant in that case, the court said: 'It was by statute bound to furnish gas upon the written application of the owner or occupant of any building or premises within one hundred feet of any main laid down by it, *subject to such just and proper regulations* as it might adopt as a means of securing payment for its gas and *safety in its supply.*' The act in force when this decision was made was section 65 of the former Transportation Corporations Law (Gen. Laws, chap. 40; Laws of 1890, chap. 566), which was in the same form as the law now in force. In neither is there any specific provision for regulations to secure

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safety in the supply. Consequently, the duty thus declared to rest upon the company was found by the Court of Appeals to be necessarily implied. The case in which the opinion quoted was written related to the duty of a gas company under the statute, and the right and duty of the company to enforce reasonable regulations to insure the safety of its supply was declared, as the opinion shows, from the known danger from escaping gas in the case of defective gas fixtures. The danger from electricity is at least as great as that from gas, and the case above cited is authority for the proposition that it is the right and duty of an electric light company, before delivering electricity to a customer, to take reasonable precautions to be assured that the private equipment within the building to which the electricity is to be delivered is adequate and safe. Indeed, it would appear from the case just cited that a gas or electric company might incur heavy responsibility if it failed to take steps to assure itself of the sufficiency and safety of the interior equipment to which it was about to deliver current. We think, therefore, that it must be taken as settled that such a company may reasonably insist upon such assurance before its statutory duty to furnish gas or electricity attaches, and, therefore, the clause in the contract between plaintiff and defendant to the effect that before supplying current the plaintiff's equipment 'shall have been approved by the constituted authorities and *by the company*' is a reasonable condition."

While in that case the company did not insist upon the installation of any safety device, the electrical engineer to the Commission advises that the reverse phase device should be installed in alternating current equipment for the safe operation of elevators.

The Elevator Manufacturers' Association in its correspondence with the Commission states that the greatest number of reverse phase accidents which have been reported have been traced to the changing of connections on the power company's lines outside of the building and for that reason the company should supply the safety device. On the other hand, the company sets forth that the primary object of the installation of this safety device is to guard against accident frequently caused by a change of wiring

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made by unskilled mechanics employed on consumers' premises. In any event, it appears that the safety device should be installed, because the measure of protection it affords in the operation of an elevator inures especially to the benefit of a consumer when the safety of his employees, his tenants and those patronizing his building is considered.

There appears to be no provision of law which requires an electric corporation to furnish any such equipment on a consumer's premises.

The objections to the provision in the schedule of the New York and Queens Electric Light and Power Company, which requires an approved reverse phase device to be included in a consumer's elevator equipment, are not, therefore, sustained. No formal proceedings in this matter having been instituted, the matter will be closed upon the records of the Commission without a formal order.

The secretary presented gas and electric complaint file No. 4162 in regard to the complaint of the Elevator Manufacturers' Association against the New York and Queens Electric Light and Power Company as to a provision in the latter's tariff schedule requiring that elevators be equipped with a reverse phase device, and an opinion therein by the Commission recommending that the objections of the complainant to the tariff provision be overruled and that the matter be closed on the records of the Commission.

On motion duly seconded, the foregoing opinion was thereupon unanimously approved.

In the Matter of the Complaint of GEORGE B. SHIRAS against the NEW YORK AND QUEENS GAS COMPANY Concerning the Extension of Said Company's Lines in Bayside, Borough of Queens

Case No. 2144

(Public Service Commission, First District, January 25, 1917)

Order dismissing complaint against the New York and Queens Gas Company.

The action herein complained of is as to the refusal of the New York and Queens Gas Company to extend its service to complainant's premises.

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Upon the facts shown at hearings held in October of 1916, the decision of which was reversed, the order now made herein dismisses the said complaint.

BY THE COMMISSION.—Hearings having been duly held in the above entitled matter on October 9 and October 16, 1916, before Honorable William Hayward, Commissioner, F. C. Pearson appearing for the complainant, P. F. W. Ruthers and M. H. Spear, appearing for the New York and Queens Gas Company, Edward J. Crummey, assistant counsel, attending for the Commission, and the Commission being of the opinion that the facts proved do not at this time justify the making of an order requiring the New York and Queens Gas Company to make the extension to the complainant's premises as asked for by the complainant, it is Ordered, that the complaint herein be and the same hereby is dismissed.

In the Matter of the Hearing on the Motion of the Commission on the Question of Alterations and Changes in the Following Grade Crossings with the Tracks of THE LONG ISLAND RAILROAD COMPANY — Fresh Pond Road and Metropolitan Avenue at Bushwick Junction

Case No. 1261

(Public Service Commission, First District, January 25, 1917)

Resolution approving acquisition of certain easements by the Long Island Railroad Company.

John W. Brunjes and Mathilda Brunjes, his wife, as owners in fee of certain land, with a brick structure thereon, at the intersection of Fresh Pond road and Metropolitan avenue, Bushwick Junction, city of New York, brought this proceeding to recover for the damages they sustained in connection with the said building, caused by the necessity of raising the floor of said structure and of making other alterations to conform to the grade elevation of the Fresh Pond road and Metropolitan avenue. The amount asked for is \$2,859.25. The claim was approved by the Commission, and also the acquisition by the city of New York of so much of the easements of access in, over and upon the said road and avenue as appertains to the brick hotel building owned by the claimants.

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BY THE COMMISSION.— Ordered as follows:

WHEREAS, on December 8, 1911, this Commission adopted a final order or determination in this proceeding as to alterations and changes in the grade crossings above enumerated, and

WHEREAS, such alterations and changes have been carried into effect and established, the grade crossing having been eliminated, and the elevation of the railroad and of Fresh Pond road, and Metropolitan avenue, having been changed in accordance with the plans and specifications heretofore made and approved, and

WHEREAS, within the time limited by law, and on February 28, 1916, John W. Brunjes, and Mathilda Brunjes, his wife, as owners in fee of certain land, with the brick building thereon, situated at the intersection of the southerly line of Fresh Pond road and Metropolitan avenue, filed their claim in writing, for the damages and injury sustained to said building, with this Commission, and

WHEREAS, this Commission, by resolution adopted July 9, 1915, did request the board of estimate and apportionment, provided proper releases of claims for damage were first executed and filed, to authorize the Long Island railroad to raise the floor of said buildings and make other alterations therein for the purpose of avoiding damage thereto at an expense estimated to be between \$2,500 and \$3,000, and said board of estimate and apportionment of the city of New York did grant such request of this Commission by resolution adopted August 5, 1915, and

WHEREAS, it now appears that the raising of the floor of said building and the other necessary alterations were made by the owner, the said John W. Brunjes, and at his own expense, subsequent to the change in the grade elevations of said Fresh Pond road and Metropolitan avenue, and on or about the 15th day of November, 1916, and

WHEREAS, the said owner, the said John W. Brunjes, appeared at the hearings on the accounting herein and filed an itemized statement of his claim for damages, including items for necessary alterations and repairs in raising the floor of said building, and in otherwise conforming the same to the new grade elevations of the said streets, together with vouchers therefor, which items for neces-

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sary alterations, exclusive of any sums expended in betterments, aggregate the sum of \$2,859.25, and

WHEREAS, the said claimant, upon request of the Long Island railroad, stated upon said hearing that he would waive the additional items claimed for damage, consisting in part of the diminution of the market and rental values of the said premises claimed to have been occasioned by such change of grade, upon condition that the said sum was actually paid to him forthwith, or within a reasonably short time, and

WHEREAS, testimony was taken upon such hearing and the claim was found to be reasonable and the items to be covered by vouchers, and to represent the reasonable cost of the material and labor necessary for such alterations in the building, and

WHEREAS, the Long Island railroad, by its attorney, the corporation counsel of the city of New York, by his representative, at the said hearing, have stated their approval of the said proposed settlement, and the same has been approved by the counsel and engineer of this Commission, and the Commissioner conducting the hearings on said accounting herein, and

WHEREAS, the representative of the city of New York has stated upon such hearings that the city of New York desired to acquire, in conformity with the provisions of section 63 of the Railroad Law, the lands, rights, and easements necessary and required for the purpose of eliminating such grade crossing, including so much of the easement of access in, over, and upon Fresh Pond road and Metropolitan avenue appurtenant to the premises of the said claimants John W. Brunjes and Mathilda Brunjes as has been necessary or required therefor, the said John W. Brunjes and Mathilda Brunjes having signified their willingness to grant and release such easement to such extent to the city of New York, upon condition of settlement of their said claim for damages,

Therefore, be it resolved, that this Commission does hereby approve of the acquisition by the city of New York of so much of the easement of access in, over, and upon Fresh Pond road and Metropolitan avenue which is or was appurtenant to the brick hotel building owned by John W. Brunjes and Mathilda Brunjes,

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situated at the interesection of the southerly line of Fresh Pond road and the easterly line of Metropolitan avenue, as may be necessary or required for the construction and maintenance of the alterations and changes in the grade and elevation of said road and avenue in conformity with the plans and specifications heretofore made and approved with respect to the elimination of such grade crossing, and that this Commission does hereby request the city of New York to acquire such easement to such extent by purchase from the said John W. Brunjes and Mathilda Brunjes upon the condition hereinafter named, and be it further

Resolved, that this Commission approves as the purchase price to be paid by the city of New York for the acquisition of such easement the sum proposed for settlement of the said claim of John W. Brunjes and Mathilda Brunjes for damages against the State of New York, the city of New York, or the Long Island railroad, for or on account of the brick building situated at the intersection of the southerly line of Fresh Pond road and the easterly line of Metropolitan avenue, in the second ward, borough of Queens, by reason of the change of elevations and grades of said Fresh Pond road and Metropolitan avenue, and by reason of the elimination of the above-named grade crossing, to wit: the sum of \$2,859.25, and be it further

Resolved, that the board of estimate and apportionment of the city of New York be, and it hereby is, requested to carry out such acquisition of the said easement and settlement of such claim, pursuant to the provision of the Railroad Law, by directing the comptroller thereof to pay forthwith to said John W. Brunjes and Mathilda Brunjes the said sum of \$2,859.25, for and on account of the said easement and claim for damage herein, and be it further.

Resolved, that said board of estimate and apportionment be, and it hereby is, requested to direct said comptroller at the time of the payment of said claim, and as a condition thereof, to obtain from the said claimants a grant and release, in proper form, of the easement of access hereinabove described to the extent hereinabove described, and of any and all claims for damages to the said premises due to the said changes of grades of Fresh Pond road and Metropolitan avenue.

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In the Matter of the Hearing on the Motion of the Commission on the Question of the Adequacy of the Facilities Afforded by INTERBOROUGH RAPID TRANSIT COMPANY at the Fourteenth Street Station on its Second Avenue Elevated Line

Case No. 2127

(Public Service Commission, First District, January 29, 1917)

Order requiring Interborough Rapid Transit Company to construct, erect and provide for use at the Fourteenth street station on its Second avenue elevated line a new covered staircase.

As the result of several hearings, the Commission has determined that new stairways should be constructed at the Fourteenth street station of the Interborough Rapid Transit Company's Second avenue elevated line in the borough of Manhattan, city of New York, at the southeast and southwest corners of Fourteenth street and First avenue, for the convenience of the public, and therefore said company is directed to provide such staircases for entrance to and exit from the north-bound platform to be constructed at the southeast corner of said intersection, and also a similar staircase in connection with the south-bound platform. The latter staircase to be constructed at the southwest corner of said intersection. The plans and specifications for such staircases to be first submitted to the Commission for approval.

BY THE COMMISSION.—A hearing having been duly had by and before the Commission in the above entitled matter on September 18, 1916, and certain adjoining dates to and including January 24, 1917, H. M. Chamberlain, assistant counsel, attending for the Commission, and James L. Quackenbush, by Arthur C. Peacock, of counsel, appearing for the Interborough Rapid Transit Company; and the Commission having determined after the proceedings on said hearing that new stairways should be constructed at the Fourteenth street station of said company's Second avenue elevated line in the borough of Manhattan, city of New York, at the southeast and southwest corners of Fourteenth street and First avenue, in order to promote the convenience of the public and in order to secure adequate facilities for the transportation of passengers on said line; and it having been made to appear after said proceedings that it would be reasonable to

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require that said stairways shall be constructed and put in operation within the time hereinafter specified;

Now therefore, it is ordered:

(1) That said Interborough Rapid Transit Company be and it hereby is directed and required to construct, erect and provide for use at the Fourteenth street station on its Second avenue elevated line in the borough of Manhattan, city of New York, a new covered stairway for entrance to and exit from the north-bound platform at said station, such stairway to be constructed at the southeast corner of Fourteenth street and First avenue; also a new covered stairway for entrance to and exit from the south-bound platform at said station, such stairway to be constructed at the southwest corner of Fourteenth street and First avenue; such new stairways to be in all respects safe, adequate and convenient for the service of the public and to be similar to other stairways now existing upon said company's Second avenue elevated line.

(2) That said company before entering upon the work of constructing said new stairways shall submit to the Public Service Commission for its approval plans and specifications showing the proposed location and details of the said new stairways to be so constructed.

(3) That after the completion of said new stairways said company shall notify the Commission of such completion and shall submit said work to the Commission for its final formal approval.

(4) That said company shall complete the construction of said new stairways and put the same in operation not later than the 1st day of May, 1917.

(5) That this Commission hereby determines that said stairways hereby directed to be erected in said location are proper for the purpose of rapid transit railways and necessary to meet the requirements of the traveling public.

(6) That this order shall take effect immediately and shall continue in force until changed or abrogated by further order of the Commission.

(7) That said Interborough Rapid Transit Company notify this Commission in writing on or before February 5, 1917, whether the terms of this order are accepted and will be obeyed.

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In the Matter of the Petition of NEW YORK MUNICIPAL RAILWAY CORPORATION for the Approval of a Contract Between the Petitioner, New York Municipal Railway Corporation, and Brooklyn Rapid Transit Company, Among Other Things for the Purchase by Brooklyn Rapid Transit Company of Bonds of the Petitioner

Case No. 1616

(Public Service Commission, First District, January 31, 1917)

Order dismissing petition of the New York Municipal Railway Corporation for the approval of a contract between it and other corporations in relation to the bonds of the Brooklyn Rapid Transit Company.

The New York Municipal Railway Corporation petitioned the Commission on January 14, 1913, for the approval of an agreement between it and the Brooklyn Rapid Transit Company for the creation of a first mortgage and for the sale to the latter company of \$40,000,000 of the bonds of the petitioner. The agreement between the two companies under which the said mortgage and bonds were to be issued was not submitted to the Commission because of the requirements of the Public Service Commissions Law. The Commission ordered, therefore, that the petition be dismissed.

BY THE COMMISSION.—Petition of New York Municipal Railway Corporation to the Public Service Commission for the First District dated and verified January 14, 1913, having been received praying that the Commission approve and consent to a certain agreement dated October 1, 1912, between New York Municipal Railway Corporation (therein termed the Subway Company) and Brooklyn Rapid Transit Company (therein termed the Transit Company), providing, among other things, for the creation by the Subway Company of its first mortgage and the issuance and sale by it to the Transit Company of \$40,000,000 of bonds of the Subway Company to be issued thereunder upon certain terms and conditions in said agreement set forth; and the said New York Municipal Railway Corporation, petitioner, having thereafter stated to the Commission by its counsel that said

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agreement was not submitted to the Commission because of the requirements of the Public Service Commissions Law, it is hereby Ordered, that said petition be and the same hereby is dismissed.

**In the Matter of the Hearing on Motion of the Commission as to
REGULATIONS AND REQUIREMENTS GOVERNING THE INSTALLA-
TION OF ELECTRICAL SERVICES IN BUILDINGS, and Materials
Used in Connection Therewith**

Case No. 2115

(Public Service Commission, First District, January 31, 1917)

Order amending a previous order prescribing regulations as to the installation of electrical services in buildings.

On November 22, 1916, the Commission made an order prescribing certain regulations in the matter of electrical installations in buildings, and the companies affected made this application for certain amendments to that order. On the report of the electrical engineer in favor of granting the amendments asked for, the order of November 22, 1916, was amended to conform to the suggestion of the operating companies.

BY THE COMMISSION.— Ordered, that the following rules and regulations governing the installation of services and meters be and hereby are prescribed for all electrical corporations within the jurisdiction of the Public Service Commission for the First District, to take effect April 1, 1917:

No electrical corporation furnishing electrical energy within the jurisdiction of this Commission shall hereafter install or put in use on any service to a consumer's premises any appliance, device, switch, fitting, or instrument transformer, the type of which shall not have been approved by this Commission.

A service, for the purposes of this order, is defined as that part of the circuit, and all equipment pertaining thereto between the point where a distributing main or feeder of an electrical corporation enters or is attached to a building and the consumer's circuit.

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WHO MAY MAKE APPLICATION

Any electrical corporation or manufacturer may make application order for test and approval of service equipment that is intended to be used within the jurisdiction of this Commission.

HOW DIRECTED

The application shall be directed to the secretary of the Commission and notice of the time and place of the tests shall be published by the Commission on the weekly calendar of hearings.

FORM OF APPLICATION

The application shall state:

- (a) The name and address of the applicant;
- (b) The name and address of the manufacturer;
- (c) The manufacturer's type designation, and a brief description of the article and its use;
- (d) The application, when possible, shall be accompanied by a catalogue or other descriptive matter.

SHIPMENT OF SAMPLES

Directions for the shipment of samples will be furnished the applicant by the Commission.

All shipment charges shall be prepaid by the applicant.

APPROVAL LIMIT

The approval of a type of device of one nominal current or voltage rating does not approve the same type of device of any other current or voltage rating; each is to be considered and approved or rejected separately.

MODIFICATIONS

The Commission shall be advised of each and every modification of service equipment used or intended for use within its jurisdiction. The necessity or desirability of a retest will be determined by the character of the modification.

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MANUFACTURER'S FEE

A fee determined as per the following schedule will be charged a manufacturer for each complete test:

SCHEDULE OF FEES CHARGED MANUFACTURERS

Conduit, metal moulding and fittings, each type....	\$2 00
Armored, lead covered, insulated cables or wires.....	2 00
Fuses, fuse blocks, insulators and ground clamps.....	2 50
Metal boxes and cabinets, each size.....	2 50
Knife switches	4 00
Circuit breakers	5 00
Potential transformers, 2,200 volts or less.....	6 00
Potential transformers, 6,600 volts	8 00
Current transformers, 250 amperes or less.....	8 00
Current transformers, 300 to 450 amperes.....	12 00
Current transformers, 500 to 800 amperes.....	15 00
Current transformers, 1,000 amperes.....	17 00

Protective devices, testing combinations, miscellaneous equipment or service equipment with an ampere capacity in excess of 1,000 amperes or a voltage rating in excess of 6,600 volts will be charged at the rate of one dollar per hour per man for the time required to determine its serviceability, the minimum charge to be three dollars and the maximum charge not to exceed fifty dollars.

Whenever service equipment is submitted so that it is represented in more than three sizes or ranges and it is found that tests of each range or size are not necessary to determine the serviceability of the type, the fee then charged will be as per schedule for each device tested and for each device in addition to those tested only one dollar per device will be charged.

PHOTOGRAPHS

Whenever it is impossible for the applicant to furnish descriptive matter with the application, it will then be necessary to submit two photographs — one view of the exterior, and one of the

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interior. One photograph will be accepted when the article has no removable housing. Each photograph to be eight by ten inches in size.

DESTRUCTION OF SAMPLES

If samples are damaged due to tests, the loss so incurred will be borne by the applicant.

The Commission will, when it deems necessary, retain one of the samples submitted.

SERVICE IN GENERAL

1. For direct or alternating current circuits of 600 volts or less, all conductors from the point where they enter the building to the point or points at which the service, or sub-service, terminates shall be protected throughout by installation in metal conduit or other approved duct or supported in an approved manner.

2. All service wire and cable joints must be soldered and covered with an insulation equal to that on the conductors. All joints shall be soldered unless made with some form of approved splicing device. All service equipment shall be mechanically secured in position.

3. Metal conduits containing service wires must be insulated from the metal conduit, metal moulding, or armored cable system within the building and all metal work on or in the building, or they must have the metal of the conduit permanently and effectually grounded. The ground connection to be independent of and in addition to any other ground wire on metal conduit, metal moulding or armored cable system within the building.

OVERHEAD SERVICES

1. Wires and cables, when they enter buildings at services, shall have dripl loops outside, and the entrance holes through which they enter shall be bushed with non-combustible, non-absorptive insulating tubes inclined upwards toward the inside, or the service wires may be brought into buildings through a single iron conduit, in which case the conduit will be equipped with an approved service head, except where duplex or triplex service cable with an approved type of insulation is used. The inner end of the con-

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duit system shall extend to the service cutout, cabinet or switchboard.

2. Where a row of separate buildings are to be supplied from an overhead main, one service cable may be run from the main to the buildings and from the first attachment to a building; a sub-service main may be extended in conduit along the outside of the buildings. One main service cable shall supply not more than five buildings except by special permission of the Commission.

3. Service wires must be at least No. 10 B & S. gauge, and if No. 6 B. & S. or smaller, must consist of multiple conductor cable.

4. Service wires extended on the exterior walls of buildings shall be run in approved conduit or supported on petticoat insulators of an approved type, placed not more than fifteen feet apart.

5. Wires must be at least eight feet above the highest point of roofs over which they pass or to which they are attached. All roof supporting structure for wire and cable shall be substantially constructed. Roof lines will be permitted only under special authorization in writing.

UNDERGROUND SERVICES

1. Underground conductors shall be protected from moisture and mechanical injury when brought into a building.

2. Service tubes shall have the ends so closed as to prevent the entrance of gases into the building.

3. Where a row of separate buildings are to be supplied from an underground main, one service cable may be run from the main to a building and enter as a service, and from this point to a sub-service main may be extended underground or in exposed iron pipe outside the buildings, or under or along or within the building wall, provided that at all times the cable is protected with two inches of brick or concrete.

SERVICE SWITCHES, CUTOUTS, CIRCUIT BREAKERS FOR SERVICES OF 600 VOLTS OR LESS

1. On constant potential circuits, all service switches must be so arranged that the fuses will protect, and the opening of the

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switch will disconnect all of the wires, except permanently grounded wires.

2. When installed without other automatic overload protective devices, automatic overload circuit breakers must have the poles and trip coil so arranged as to afford complete protection against overloads and short circuits. In two or three phase three-wire circuits and two-phase four-wire circuits there must be a trip coil in each phase. If a circuit breaker is used in place of the switch, it must be so arranged that no one pole can be opened manually without disconnecting all the wires, except permanently grounded wires.

3. Switches, cut-outs and circuit breakers must, when placed where exposed to mechanical injury or in the immediate vicinity of easily ignitable stuff or where exposed to inflammable gases, or dust or flying of combustible material, be mounted in approved cut-out boxes or cabinets, except oil switches, circuit breakers, and similar devices which have approved casings. All devices which produce or create sparks or arcs must be placed in approved vapor-proof inclosures.

4. Switches, cut-outs and circuit breakers must, when located where exposed to moisture, unless they are moisture proof, be mounted in approved cut-out boxes or cabinets.

5. Automatic cut-outs must be placed on all service wires, except permanently grounded wires, either overhead or underground, in the nearest accessible place to the point where they enter the building and inside the walls and arranged to cut off the entire current from the building, except where it is legally required that fire alarms, fire pumps, exit lights, etc., be connected ahead of service switches.

6. Service switches must indicate plainly whether they are open or closed.

7. Single-pole knife switches must never be used as service switches.

8. Single-throw knife switches must be so placed that gravity will not tend to close them. Double-throw knife switches may be mounted so that the throw will be either vertical or horizontal, as preferred, but if the throw is vertical, a locking device must be

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provided, so constructed as to insure the blades remaining in the open position when so set.

SERVICE TRANSFORMERS

1. Transformers must not be attached to any building where the potential exceeds 600 volts, except by special permission and when attached to a building must be separated therefrom by substantial supports.

2. Oil transformers must not be placed inside of any building unless located in a transformer vault that has either received specific approval or has been constructed in accordance with an approved design.

3. Air cooled transformers must not be placed inside of any building unless installed in an approved transformer vault and mounted so that the case shall be at a distance of at least one foot from combustible material or separated therefrom by a slab or panel of non-combustible, non-absorptive, insulating material.

4. Transformers permitted inside of buildings must be located as near as possible to the point at which the primary wires enter the building.

5. Transformer vaults must be constructed of fire-proof material. The inclosure shall have no opening to the building, except through an approved tight-fitting fire door. It shall be ventilated in some approved manner, used only to contain transformers and other service equipment and be kept securely locked to prevent access by other than responsible persons. Suitable oil drain or guard sills shall be provided when necessary.

6. Transformers installed in vaults shall have their cases permanently and effectually grounded.

GROUNDING

1. The grounding of low potential circuits under the following regulations is only allowed when such circuits are so arranged that under normal conditions of service there will be no appreciable passage of current to ground.

2. On underground systems, the neutral wires must be grounded at each distributing box through the box, or to a system ground

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wire connected to the grounded conductors of many secondary mains, or on the individual service.

3. Transformer secondaries of distributing systems (except where the primary voltage does not exceed 600 volts) must be grounded provided the maximum difference of potential between the grounded point and any other point in the circuit does not exceed 150 volts and may be grounded when the maximum difference of potential between the grounded point and any other point in the circuit exceeds 150 volts. In either case, the following rules must be complied with.

(a) The ground shall be made at the neutral point or wire, whenever a neutral point or wire is accessible.

(b) When no neutral point or wire is accessible, one side of the secondary circuit shall be grounded.

(c) The ground shall be at the transformer or on the individual service and may be connected to a system ground wire connected to the grounded conductors of three or more secondary mains. When one or more transformers feed a system having a neutral wire such wire shall be grounded at the transformer, and also be grounded on an average of every 500 feet or less.

4. Ground wires shall be copper and never less than No. 6 B. & S. gauge, and have an approved insulating covering.

5. On three-phase systems the ground wire shall have a carrying capacity equal to that of any one of the three mains.

6. The cases or frames of transformers used exclusively to supply current to meters shall be grounded unless they are installed and guarded in all respects as required for the higher voltage circuit connected to them.

7. Ground connections to metallic piping systems should be made on the street side of water meters, but connections may be made immediately inside building walls to secure accessibility for inspection and test. When water meters are located outside buildings, or in concrete pits within buildings where piping connections are imbedded in concrete flooring, the ground connections may be made on the building side of the meters, if they are suitably shunted.

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LOCATION OF METERS

1. Meters shall be installed in a clean, dry, safe place, not subject to vibration or great variations in temperature.
2. Where it is necessary to install meters in locations exposed to weather conditions, they shall be protected by suitable boxes or cabinets.
3. Meters should be easily accessible for reading, testing and making necessary adjustments and repairs.

EXCEPTIONS AND CHANGES

Exceptions to one or more of the rules contained herein can be obtained only by permission of the Commission and any conditions not covered by these rules shall be specially considered and must be approved by the Commission.

When in the judgment of the Commission, after due inspection, any appliances, devices, transformers, switches, meters or circuits included in service equipment, are unsafe or dangerous to persons or property, the Commission after notifying the corporation and allowing a reasonable time to put same in safe condition shall cause such to be disconnected from the electrical source and seal same to prevent their use. When so disconnected and sealed the electrical corporation shall not cause or permit their employees to connect or put in use any service equipment until the same has, in the opinion of the Commission, been made safe and the electrical corporation advised in writing to that effect.

Further ordered, that this amendatory order take effect at once and that the companies below named notify the Commission on or before February 10, 1917, whether the terms of this order as amended are accepted and will be obeyed.

PUBLIC SERVICE COMMISSION

SECOND DISTRICT

In the Matter of the Joint Petition of the SCHENECTADY POWER COMPANY and HOOSAC RIVER ELECTRIC LIGHT AND POWER COMPANY, under Section 70 of the Public Service Commissions Law, for Consent that the First Named May Acquire Additional Stock of the Second Named and May Merge the Second Named under Section 15 of the Stock Corporation Law

Case No. 5646

(Public Service Commission, Second District, September 7, 1916)

Electric light and power companies — application by one company to acquire additional stock of a second company and for merger of the two companies.

This matter was taken up by a petition filed July 26, 1916, and a petition supplemental thereto was filed August 4, 1916, by the Schenectady Power Company for leave to acquire ten shares of the common capital stock of the Hoosac River Electric Light and Power Company of the par value of \$100 each. This stock was held in the names of the individual directors of the Schenectady Power Company, but was really owned by the latter company. A previous purchase of stock by the power company in 1910 and 1911 of the par value of \$15,000 is also sought to be authorized *nunc pro tunc*. The merger of the two companies is now sought. Permission granted with the usual restrictions.

BY THE COMMISSION.—Now therefore, upon the foregoing record, ordered as follows:

1. That the Schenectady Power Company is hereby authorized to acquire and hold ten shares of common capital stock of the Hoosac River Electric Light and Power Company of the par value of \$100 each now outstanding, which stock is now held in the names of the directors of said corporation and was, in fact, owned by said Schenectady Power Company prior to January 1, 1910, provided there shall be no expense, other than such taxes as may

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be imposed on transfers of stock, attached to the acquisition of said stock from the directors of said corporation.

2. That the purchase and acquisition by the Schenectady Power Company in the years 1910 and 1911 of 150 shares of common capital stock of the Hoosac River Electric Light and Power Company of the par value of \$100 each aggregating a total par value of \$15,000 be and the same hereby is authorized *nunc pro tunc*, the said Hoosac River Company having set forth in its petition, verified February 15, 1910, asking for permission to issue said stock, in Case No. 1514, that it intended to sell the same to the Schenectady Power Company at par and the record in said case shows that said corporation reported to the Commission from time to time the sale of said stock and that it had been sold to the said Schenectady Power Company.

3. That the Hoosac River Electric Light and Power Company is hereby authorized to transfer and sell all of its assets, property, rights, privileges and franchises to the Schenectady Power Company and this Commission hereby permits and approves of the transfer to and the acquisition by the Schenectady Power Company of all of the assets, property, rights, privileges and franchises of the Hoosac River Electric Light and Power Company.

4. That the Schenectady Power Company and Hoosac River Electric Light and Power Company are hereby permitted to merge, and such merger is approved, and consent is hereby given to the exercise by the Schenectady Power Company of all the rights, privileges and franchises of the Hoosac River Electric Light and Power Company; and within thirty days after such merger shall have become effective the Schenectady Power Company shall file with this Commission a verified report setting forth the exact date of such merger.

5. That the merger of the Schenectady Power Company and the Hoosac River Electric Light and Power Company shall be rescinded by the consolidation of like accounts as represented upon the books of the petitioners.

6. That the authority contained in this order is upon the express condition that the petitioners accept and agree to comply

Public Service Commission, Second District

in good faith with the provisions hereof and within thirty days from the service hereof the Schenectady Power Company and Hoosac River Electric Light and Power Company shall file with the Commission a satisfactory verified stipulation duly authorized by their boards of directors accepting this order with all its terms and conditions, and such order shall be void and no force or effect until such stipulation shall have been filed as required herein.

In the Matter of the Joint Petition of the CITY OF MOUNT VERNON, the CITY OF YONKERS, THE NEW YORK CENTRAL RAILROAD COMPANY and the BRONX PARKWAY COMMISSION for a Modification of Orders of this Commission Dated September 12, 1907, and June 27, 1912, the Modification Asked for Being with Respect to the Location and Construction and Design of an Over Grade Crossing of the New York and Harlem Railroad (Lessor) Extending from Broad Street, City of Mount Vernon, to Vermont Avenue, City of Yonkers

Case No. 254

(Public Service Commission, Second District, September 7, 1916)

Application for the modification of certain outstanding orders of the Commission.

The New York Central Railroad Company, the cities of Mount Vernon and Yonkers and the Bronx Parkway Commission, having come to an intermediate settlement in the matter of expenditures incurred in carrying out an order of the Commission, this proceeding is to secure the approval of such settlement. Approval granted.

BY THE COMMISSION.—Ordered: 1. That the first intermediate settlement entered into by the New York Central Railroad Company with the City of Mount Vernon, the City of Yonkers, and the Bronx Parkway Commission, showing expenditures to the amount of \$905.83 properly and necessarily incurred in carrying out the Commission's order in the above entitled matter, be and it is hereby approved; said amount of \$905.83 having been

Public Service Commission, Second District

expended by the Bronx Parkway Commission as agent for the New York Central Railroad Company, said settlement having been accepted by the railroad corporation, as indicated by the signature of its treasurer; by the City of Mount Vernon, as indicated by the signatures of its mayor and city clerk; by the City of Yonkers, as indicated by the signatures of its mayor and city engineer; and by the Bronx Parkway Commission, as indicated by the signatures of its president and engineer and secretary.

Ordered (2) That of the total amount of \$905.83 thus expended and herein accounted for the share of and the amount chargeable to the State of New York is the sum of \$82.07, which is now due from and properly payable by the State to the Bronx Parkway Commission, and the respective shares of and the amounts chargeable to the remaining parties in interest are as follows: City of Yonkers, \$165.49; City of Mount Vernon, \$456.18; New York Central Railroad Company, \$164.14, and the Bronx Parkway Commission, \$37.95.

In the Matter of the Joint Petition of the LONG ISLAND GAS CORPORATION and J. A. SANFORD AND SONS, under Section 70 of the Public Service Commissions Law, for Consent to the Transfer of the Franchises, Works and System of an Acetylene Gas Plant; and by the Long Island Gas Corporation under Section 69 for Authority to Issue \$765 in Mortgage Bonds

Case No. 5637

(Public Service Commission, Second District, September 7, 1916)

Transfer and sale of the acetylene gas plant at Bridgehampton, N. Y.

J. A. Sanford & Sons are a copartnership and own as such the acetylene gas plant and distribution system located in the village of Bridgehampton, N. Y., including all rights, titles and privileges under a local franchise. Upon the joint petition of the copartnership and the Long Island Gas Corporation, the Commission approves the transfer of the said property and also of the local franchise, and authorizes the gas corporation to issue at face value its promissory notes therefor.

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BY THE COMMISSION.—Ordered as follows:

1. That J. A. Sanford & Sons, a copartnership, is hereby authorized to transfer and sell its acetylene gas plant and distribution system located in the village of Bridgehampton, including all rights, titles and privileges under a franchise granted by the highway commissioners of the town of Southampton, dated April 18, 1902, to the Long Island Gas Corporation; and this Commission hereby permits and approves of the transfer to and acquisition by the Long Island Gas Corporation of such property and franchise of the copartnership of J. A. Sanford & Sons.

2. That the Long Island Gas Corporation is hereby authorized to issue \$650 face value of its 6 per cent not to exceed three year promissory notes which shall be sold for not less than their face value and accrued interest to give net proceeds of at least \$650.

3. That said notes of the total face value of \$650 so authorized or the proceeds thereof to the amount of \$650 shall be used solely and exclusively for the following purposes:

(a) For the purchase from J. A. Sanford & Sons, a copartnership, of an acetylene gas plant, including gas making machinery, located in the village of Bridgehampton, together with all pipes laid for distribution of acetylene gas, etc., as detailed in Exhibit C attached to the petition herein	\$300 00
(b) For attorney's fees and other expenses in connection with the acquisition of such property . . .	350 00
	<hr/>
	\$650 00
	<hr/> <hr/>

4. That the Long Island Gas Corporation shall for each six months' period ending December thirty-first and June thirtieth, file not more than thirty days from the end of such period a verified report showing:

(a) What notes have been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

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- (b) What proceeds were realized from such sale.
- (c) Any other terms and conditions of such sale.
- (d) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the notes herein authorized, and such report shall show for each of such purposes to what account or accounts such expenditures have been charged.

Such reports shall continue to be filed until all of said notes shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no notes were sold or disposed of or proceeds expended, the report shall set forth such fact.

5. That the company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said notes herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of INTERNATIONAL RAILWAY COMPANY, under Section 53, Public Service Commissions Law, for Permission to Construct an Extension of its Railway and to Double Track Certain of its Lines in the City of Lockport; and for Approval of the Exercise of a Franchise Therefor Received from the City

Case No. 5674

(Public Service Commission, Second District, September 12, 1916)

Application by International Railway Company to extend its tracks in the city of Lockport, N. Y.

The International Railway Company granted permission to put in a double track extension of its electric railway on West avenue, between Transit street and Hawley street. Permission granted and a local franchise for such purpose approved.

Public Service Commission, Second District

BY THE COMMISSION.—A petition, under section 53, Public Service Commissions Law, having been filed with this Commission by the International Railway Company for permission to construct, in the city of Lockport, additions to its electric railway hereinafter described and for approval of the exercise of a franchise therefor received from the city; and a public hearing on said petition, after due notice, having been held by this Commission in the city of Albany on September 6, 1916, Morris Cohn, Jr., appearing for the petitioner and no one else appearing; and it appearing that petitioner has filed in the proper record offices a certificate of extension of its railway covering the proposed extension; and this Commission determining from the papers and the hearing that such construction and exercise of franchise is necessary and convenient for the public service; it is

Ordered, That this Commission, under section 53, Public Service Commissions Law, hereby permits and approves construction in the city of Lockport by the International Railway Company of a double track extension of its electric railway on West avenue between Transit street and Hawley street, of a double track (in place of its present single track) on Main street, about 150 feet east of Transit street, and of a double track (in place of its present single track) on Hawley street from the right of way of the Erie Railroad Company to a point between West avenue and Park avenue, with all necessary switches, sidings, turnouts, cross-overs and connections, to be operated by the single overhead electrical trolley system of motive power; and hereby permits and approves the exercise by said company of a franchise for such construction granted to said company by the common council of said city August 14, 1916, and approved by the mayor the same day, a copy of which franchise, certified by William G. Spalding, city clerk, to be a true copy, is filed with this Commission with the papers in this case.

Public Service Commission, Second District

In the Matter of the Petition of the BOARD OF PUBLIC WORKS OF ROME, under Section 90 of the Railroad Law, for a Determination as to how an Extension of Fifth Street in Said City Shall Cross the Industrial Branch of the New York Central Railroad in Said City

Case No. 5560

(Public Service Commission, Second District, September 19, 1916)

Authority of municipal authorities to determine the necessity for opening a new street across a steam surface railroad—limitation upon authority of Commission.

Under section 90 of the Railroad Law the procedure, when it is proposed to open a new street or portion of a street across a steam surface railroad, is for the municipal authorities, after notice and hearing, to determine the necessity of opening such street or portion of street, and having determined that such opening is necessary, to apply to the Commission to determine whether such street shall pass over or under such railroad or at grade. The Commission has no authority to determine the necessity of opening such street, nor has it authority to determine whether such street shall pass over or under such railroad or at grade until the municipal authorities have determined the necessity of the street.

Albert J. O'Connor, City Attorney, for the City of Rome.

H. Clayton Midlam, Mayor of City of Rome; T. J. Mowry and D. A. Lawton, Members of the Board of Public Works of Rome; H. Barnard, Jr., President of the Common Council.

Arthur S. Evans, Rome, N. Y., for Rome Wire Company, Rome Manufacturing Company, Rome Brass and Copper Company, and Rome Hollow Wire and Tube Company.

William Eames, for James A. Sparge, President of Sparge Wire Company.

William A. Searles, Secretary, Chamber of Commerce of Rome.

Kernan & Kernan, Utica, N. Y. (by Warnick J. Kernan), for The New York Central Railroad Company.

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IRVINE, Commissioner.—This is an application on behalf of the city of Rome for “permission to extend Fifth street from East Dominick street across the New York Central tracks to Railroad street, in the city of Rome, at grade.” Under the charter of the city of Rome, the board of public works is constituted the municipal authority having control over streets. The main line of the New York Central and Hudson River railroad formerly passed through the section of Rome herein involved. These tracks are now industrial tracks of the New York Central railroad. Parallel thereto on the north is East Dominick street; and on the south, Railroad street. Fifth street extends south to East Dominick street, where it now ends. What is desired is to extend Fifth street at grade across these industrial tracks to Railroad street. The project, therefore, is to construct a new portion of a street across a steam surface railroad, and the application must be sustained, if at all, under section 90 of the Railroad Law. This, omitting portions not relevant to the present inquiry, provides that “when a new street, avenue, highway or road or new portion of a street, avenue, highway or road * * * shall hereafter be constructed across a steam surface railroad * * * such street, avenue, highway or road or portion of such street, avenue, highway or road shall pass over or under such railroad or at grade as the Public Service Commission shall direct. Notice of intention to lay out such street, avenue, highway or road or new portion of a street, avenue, highway or road across a steam surface railroad shall be given to such railroad company by the municipal corporation at least fifteen days prior to the making of the order laying out such street, avenue, highway or road. * * * Such railroad company shall have the right to be heard before the authorities of such municipal corporation upon the question of the necessity of such street, avenue, highway or road * * * If the municipal corporation determines such street, avenue, highway or road to be necessary * * * such municipal corporation * * * shall then apply to the Public Service Commission before any further proceedings are taken to determine whether such street, avenue, highway or road shall pass over or under such railroad or at grade.”

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Further provisions also plainly indicate that the province of this Commission, and its sole province, is, after a determination by the municipal corporation that the street is necessary, to determine in what manner it shall cross the railroad, whether above, below, or at grade. In this case the record shows that notice of a hearing before the board of public works was given to the railroad company; that a hearing was held; and that thereafter the only action taken was a resolution of the board, as follows: "That the city attorney be and he hereby is authorized and directed to take such steps as may be necessary for the purpose of presenting the matter of the extension of Fifth street across the New York Central Railroad tracks to Railroad street, to the Public Service Commission, and secure, if possible, such crossing." The railroad company contends that this does not constitute a determination of the necessity of the proposed extension of the street; that there has been no such determination; and that there is no order laying out such extension. The Commission is forced to the conclusion that this contention is well founded. The statute evidently leaves it to the municipal authorities to determine whether the new street or extension of street is necessary. It is not within the authority of the Commission to lay out city streets or to determine the necessity therefor. The city having determined the necessity of extending the street, the extent of the Commission's authority is plainly indicated by the statute. It is restricted to determine the manner in which the street shall cross the railroad, whether overhead or underneath the tracks, or at grade.

The point raised is not a barren technicality. The railroad company resists a grade crossing at this point, and it is probable that a crossing except at grade is not practicable. It contends that the proposed extension is not necessary, and it has a right to a judicial review of that question. The determination of the question must in the first instance be by the municipal authorities. The resolution neither expresses nor implies a determination as to the necessity of extending the street. It proceeds upon the assumption that this Commission rather than the board of public works has authority in the premises, and merely instructs the city attorney to take steps before the Commission to secure, if

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possible, such crossing. While it is plainly inferable that the members of the board of public works thought the street extension desirable, it is as strongly inferable that they did not realize that they were the body who must authoritatively pass upon and determine the necessity of the extension. The board has not created or laid out any street, and until it shall have done so the Commission cannot determine the manner of crossing the railroad.

Should the Commission proceed to determine the manner of crossing, its order would be voidable, if not absolutely void, for lack of the statutory foundation. The petition must, therefore, be dismissed.

All concur.

In the Matter of the Complaint of RESIDENTS OF THE HAMLET OF WEST FALLS, Town of Aurora, Erie County, against BUFFALO, ROCHESTER AND PITTSBURGH RAILWAY COMPANY, as to Location of New Station Building Proposed to Be Built

Case No. 4942

(Public Service Commission, Second District, September 19, 1916)

Unimportant errors in data presented to the Commission do not justify reopening of a case.

An application brought by certain residents of West Falls, in the town of Aurora, relative to the proposed location of a new passenger station at West Falls, was dismissed. The present application is for a rehearing upon the ground that certain misrepresentations had been made by the representatives of the railroad company, which might have influenced the decision. A hearing upon this application resulted in the whole matter being examined exhaustively on the merits. The errors made in the data presented to the Commission by the railway company proved immaterial and the application for rehearing was denied.

Messrs. Kellogg & Baker, by Philip A. Sullivan, for citizens of the village of West Falls and for Mr. Hoyt Henshaw in favor of the Holmes site.

Public Service Commission, Second District

Messrs. Clinton, Clinton & Stryker, by George Clinton, Jr., for citizens in favor of the old site.

Messrs. Havens & Havens, by W. F. Strang, for the Buffalo, Rochester and Pittsburgh Railway Company.

Mr. Hoyt Henshaw in person.

BY THE COMMISSION.—On the 26th day of July, 1916, this Commission entered an order dismissing the complaint of certain residents of the hamlet of West Falls, in the town of Aurora, relative to the proposed location of the new passenger station and the adequacy of the site of said station at West Falls, on the line of the Buffalo, Rochester and Pittsburgh Railway Company, and also denying the request of the complainants that said station should be erected at another place in the town known as the Holmes site. The complainants feeling aggrieved at this determination by the Commission made an application for a rehearing claiming that certain misrepresentations had been made to the Commission by the representatives of the railway company which might have influenced the decision so made. The hearing upon this application for a rehearing was brought on before the Commission in the city of Albany, N. Y., on September 13, 1916. The matter was gone into quite exhaustively on the merits at that time, and counsel for the complainants as well as one of the complainants in person, Mr. Henshaw, stated that no further facts than those there presented could be furnished the Commission if a rehearing on this application should be granted, and that so far as they were concerned, they would be satisfied if the Commission should consider this as not only an application for a rehearing, but in fact a rehearing. We think perhaps it may be advisable to handle the case in that way, and thus dispose of it upon its merits at this time. No new facts regarding the matter were presented to the Commission, but it did appear that in some few respects there had been certain errors made in the data and statements presented to the Commission by the railway company. These, however, are not so material as to justify a reopening of the case, nor would they in the opinion of the Com-

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mission afford ground for changing the determination which has previously been made. It may not be out of place here to restate a few of the facts which appear in the record in this case.

About two years ago the passenger station of the Buffalo, Rochester and Pittsburgh Railway Company at West Falls was destroyed by fire. Since that time, temporary passenger station facilities have been provided there at the same location. An improved brick paved state highway passes through the hamlet of West Falls, running in a general northerly and southerly direction. This improved highway crosses the tracks of the railway company at or near the site of the former passenger station. The freight yard is also located near that site. Passengers traveling on foot or in vehicles can reach the present station conveniently by means of the improved highway. The center of the hamlet of West Falls is at a point on the state highway about 3,600 feet southerly from the site of the old station. The railway company proposes to build a new passenger station upon the old site, and claims that if its plans are carried out adequate and proper facilities will be provided for passenger and freight traffic. The complainants seek to have the new passenger station located at a point on the line of the railway about 1,300 feet westerly from the center of the hamlet above referred to. The new site is now reached by an existing country highway of varying grades and unimproved in any respect. Some of the interested parties have agreed to donate a parcel of land for station purposes at the point in question. It would probably entail considerable more expense upon the railway company to put up a station at the site proposed by the complainants, and a substantial amount of money would also be required to improve the highway so as to make a suitable approach to this location from the center of the village. The complainants state that such a road will be provided, together with a cement sidewalk. However, these improved approaches do not now exist, and there is no assurance that if such a road were provided it would be properly maintained by the town. The railway company, if it established its station at this point, would then be in the position of having its passenger station at least a half a mile away from its freight sta-

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tion if its freight yard were kept at its present location, with the additional expense and inconvenience which would be entailed thereby. It is very doubtful if the Commission would have the power, on the state of facts presented in this case, to require such a separation of passenger and freight facilities in the hamlet of West Falls; it certainly could not be urged from the standpoint of economy in operation. Some claim has been made that the freight facilities are now inadequate, but the representatives of the corporation claim that when its plans are worked out, these facilities will be adequate for all purposes. Primarily, it is the opinion of the Commission that the location of a passenger station should be determined by the railway company, as it is presumed to know best where such a station should be located properly to serve the public. While there may be certain inconveniences caused to some of the residents of West Falls by the rebuilding of the passenger station on the old site, yet from all the facts which appear in the record in this case, it is apparent that the old site will afford better accommodations at present, in any event, than the site which has been proposed. It is incumbent upon the railway company to provide the public with suitable and adequate passenger and freight facilities at West Falls. If it should develop that the plans of the railway company if followed out as proposed do not furnish such facilities, the Commission has the power to require the company to provide them; whether or not the views of the representatives of the railway company are correct can only be determined by actual experience. It is, therefore, incumbent upon the railway company, before it proceeds with its plans, to be fully satisfied that such facilities will be afforded in order that all cause for complaint as to either passenger or freight facilities may be obviated.

The Commission has not attempted to pass upon the plans of the railway company for the new passenger station and additional facilities at West Falls, and the fact that it has decided this matter adversely to the complainants is not to be taken in and of itself as an approval of such plans. In our opinion, the Commission could not possibly justify an order requiring the company to build a new passenger station at the site proposed by the

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complainants; and having in mind its power to compel the corporation to provide adequate facilities, it is our belief that the order heretofore made in this matter should stand, and the application for a rehearing be denied. An order to that effect should be entered accordingly.

All concur except Commissioner Hodson, who did not participate in this decision.

In the Matter of the Complaint of ISAAC SMITH against WYNANTSKILL HYDRO-ELECTRIC COMPANY Alleging Failure to Furnish Electricity to his Summer Residence after Request

Case No. 5670

(Public Service Commission, Second District, September 19, 1916)

Failure of a hydro-electric company to furnish electricity for part of the year to a summer resident.

The complainant alleges that the Wynantskill Hydro-Electric Company has failed to give service at his summer residence, on stipulation between the Wynantskill company and the complainant, in the town of North Greenbush, Rensselaer county, N. Y. It was arranged that the company connect up its line with the complainant's house. This arrangement was approved by the Commission, with leave to the respondent to notify the Commission on or before May 5, 1917, whether it has connected its line.

BY THE COMMISSION.—A hearing upon this complaint was held at the office of the Commission in the city of Albany, N. Y., on September 11, 1916. John P. Judge of Troy, N. Y., appeared for the complainant, and C. C. Hastings, the president of the Wynantskill Hydro-Electric Company, appeared on behalf of that corporation.

It developed on the hearing that the complainant would be satisfied if his premises were connected up with the lines of the respondent by May 5th of the year 1917, as he only requires electric energy during the summer season. The respondent is willing to connect up his service provided the complainant fur-

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nishes the necessary wire to take the electricity from the nearest pole of the respondent to the residence of the complainant, if the complainant will furnish at his own expense the brackets required to attach these wires to the house and will also have these service wires connected with the wiring in the house. The complainant having expressed his willingness to comply with these requirements of the respondent and Mr. Hastings having indicated his willingness to connect up with the service as herein outlined on or before May 1, 1917, it is

Ordered: 1. That the Wyantskill Hydro-Electric Company connect up its lines with the residence of the complainant in the town of North Greenbush, Rensselaer county, N. Y., and furnish the complainant with electric energy therein, provided the said complainant shall supply at his own expense a sufficient amount of wire of the proper size to properly connect up his residence with the lines of the respondent and also the brackets required to support said wires on the outside of the house and also connect up said service wires with the inside wiring. Upon compliance with these conditions by the complainant, the respondent shall supply the service required by the complainant upon his agreeing to take the service in accordance with the rules and regulations of the respondent.

2. That the respondent shall notify this Commission in writing on or before the 25th day of September, 1916, whether it will obey the terms of this order and comply with the same in all respects.

3. That the respondent shall notify the Commission in writing on or before May 5, 1917, whether or not it has connected its lines with the residence of the complainant as herein provided and is then prepared to furnish the complainant with electric energy for use upon said premises.

Public Service Commission, Second District

In the Matter of the Petition of BOMBAY ELECTRIC CORPORATION, under Section 68 of the Public Service Commissions Law, for Permission to Construct in the Town of Bombay, Franklin County, an Electric Plant Including Poles, Wires, Conduits and Appurtenances for Transmitting and Furnishing to the Public Electricity for Light, Heat or Power and for Approval of the Exercise of Rights and Privileges under a Franchise Therefor Received From the Town

Case No. 5679

(Public Service Commission, Second District, September 19, 1916)

Electric light companies — application of the Bombay Electric Corporation for leave to construct an electric plant in the town of Bombay, Franklin county.

In the town of Bombay, Franklin county, N. Y., there is no corporation engaged in supplying electric energy, and this application is for the purpose of relieving that situation. Permission granted by the Commission and a local franchise given to the said company by the town board of Bombay approved with the usual restrictions.

By THE COMMISSION.— The application of the Bombay Electric Corporation for permission to exercise a franchise and construct an electric plant in the town of Bombay, Franklin county, N. Y., was filed with this Commission on August 7, 1916. Proof of publication of notice of the application was duly filed with the Commission on September 12, 1916. A hearing was held at the office of the Commission in the city of Albany, N. Y., on September 14, 1916, at which time LeRoy M. Kellas of Malone, N. Y., appeared on behalf of the petitioner and no one appeared in opposition to the application. There is no other corporation engaged in supplying electric energy in the town of Bombay and the hamlet of the same name at the present time. The granting of this application will enable the residents of this community to have electricity for use in their homes and also to have electric lights in the streets. The town board of the town of Bombay granted the Bombay Electric Corporation a franchise on the 15th day of August, 1916, permitting it to operate in said town for a period of ninety-nine

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years, a certified copy of said franchise forming a part of the record in this case. The Commission having determined after due deliberation that the construction of an electric plant in the town of Bombay and the exercise of said franchise therein by the Bombay Electric Corporation are necessary and convenient for the public service, it is

Ordered: 1. That pursuant to the provisions of section 68 of the Public Service Commissions Law, the permission and approval of this Commission be and they hereby are given to the Bombay Electric Corporation to construct, maintain and operate an electric plant with transmission and distribution lines in the town of Bombay, Franklin county, N. Y., and to exercise all the rights and privileges set forth in the franchise granted to it by the authorities of said town on August 15, 1916.

2. That this order is not intended to and shall not be construed to authorize any construction work in or upon any State or county highway unless and until the consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

In the Matter of the Application of the ITHACA GAS AND ELECTRIC CORPORATION, under Section 69 of the Public Service Commissions Law, for Authority to Issue \$80,000 Common Capital Stock

Case No. 5456

(Public Service Commission, Second District, September 20, 1916)

Gas and electric companies — application of the Ithaca Gas and Electric Corporation for leave to issue \$67,600 of its common capital stock at par.

The Ithaca Gas and Electric Corporation filed its petition March 1, 1915, for leave to issue certain common capital stock at par, and on reference of the same to the division of capitalization a report was made as of April 13, 1916, and on April 23, 1916, the gas engineer of the Commission filed his report. The electrical engineer reported May 20, 1916, and the final report of the division of capitalization was made June 16, 1916. A supplemental application was made July 29, 1916, and as the result of the investigations the Commission granted permission to the corporation to issue \$67,600 of its common capital stock at par for purposes therein specified.

Public Service Commission, Second District

By THE COMMISSION.— Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated June 16, 1916, which on June 26, 1916, was sent to the corporation, such entries being listed on pages 18 and 19 thereof, shall be entered on the books of the Ithaca Gas and Electric Corporation, and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entries have been made.

2. That the Ithaca Gas and Electric Corporation is hereby authorized to issue \$67,600 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to realize proceeds of at least \$67,600.

3. That said stock of the total par value of \$67,600 so authorized or the proceeds thereof to the amount of \$67,600 shall be used solely and exclusively for the following purposes:

(a) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of assets during the calendar years 1914 and 1915, not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation.....	\$21,094 44
(b) For the payment of accrued taxes owing at December 31, 1915.....	5,330 96
(c) For working capital.....	41,300 00
	<hr/>
	\$67,728 40
Deduct excess proceeds of bonds authorized in Case No. 5486.....	143 44
	<hr/>
	\$67,581 96
	<hr/>
Excess.....	\$18 04
	<hr/>

in so far as the same may be applicable, provided:

(1) That such working capital shall not be disbursed by such

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company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

4. That if the said stock of the total par value of \$67,600 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$67,600, no portion of the proceeds of such sale in excess of \$67,641.96 shall be used for any purpose without the further order of this Commission.

5. That the Ithaca Gas and Electric Corporation shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) The amount used during such period of the proceeds of the stock herein authorized for the purpose specified herein.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds used and expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds used or expended, the report shall set forth such fact.

6. That the Ithaca Gas and Electric Corporation is hereby authorized to sell the 676 shares, each of the par value of \$100, aggregating a total par value of \$67,600, of common capital stock herein authorized to be issued, to the Associated Gas and Electric Company, and the Associated Gas and Electric Company is hereby authorized to acquire and hold such stock of the Ithaca Gas and Electric Corporation, so authorized.

7. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued or

Public Service Commission, Second District

sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

8. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days from the service hereof, the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Application of the GRANVILLE ELECTRIC AND GAS COMPANY, under Section 69 of the Public Service Commissions Law, for Authority to Issue Additional Bonds

Case No. 4529

(Public Service Commission, Second District, September 20, 1916)

Gas and electric companies — application of the Granville Electric and Gas Company for leave to issue certain of its 5 per cent bonds under an outstanding mortgage.

The Granville Electric and Gas Company requested permission to issue \$16,000 face value of its 5 per cent thirty-year first and refunding mortgage gold bonds under a certain indenture dated October 1, 1912, given to the Guaranty Trust Company of New York, as trustee, to secure an authorized issue of a total face value of \$400,000. The Commission having made examination of the facts upon which the application is

Public Service Commission, Second District

based, authorized the company to issue the same, and also to issue \$12,800 par value of its common capital stock to be sold at not less than par; such permission in each case to be subject to the usual restrictions.

Petition filed September 29, 1914.

Report of division of capitalization dated April 30, 1915.

Report of gas engineer dated June 7, 1915.

Report of electrical engineer dated April 19, 1916.

Final report of division of capitalization dated May 20, 1916.

Supplemental and amendatory petition filed July 9, 1916.

Supplement to final report dated September 18, 1916.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated May 20, 1916, as amended by supplement thereto, dated September 18, 1916, which on May 26, and September 18, 1916, respectively, were sent to the corporation, such entries being numbered 1, 3 and 5 of the former and 2, 4, 6, and 7 of the latter, shall be entered upon the books of the Granville Electric and Gas Company, and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entries have been made.

2. That the Granville Electric and Gas Company is hereby authorized to issue \$16,000 face value of its 5 per cent thirty-year first and refunding mortgage gold bonds under a certain indenture, dated October 1, 1912, given to the Guaranty Trust Company of New York, trustee, to secure an authorized issue of a total face value of \$400,000.

3. That the Granville Electric and Gas Company is hereby authorized to issue \$12,800 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$12,800.

4. That said bonds of the total face value of \$16,000 shall be sold for not less than 80 per cent of their face value and accrued interest to give net proceeds of at least \$12,800.

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5. That said securities of the par and face value of \$28,800 so authorized or the proceeds thereof to the amount of \$25,600 shall be used solely and exclusively for the payment of indebtedness outstanding at December 31, 1914, as set forth in the final report of the division of capitalization of the Commission, dated May 20, 1916, or the renewals thereof, \$25,601.60. Amount unprovided for, \$1.60.

6. That if the said securities of the total face and par value of \$28,800 shall be sold at such price as will enable the company to realize net proceeds of more than \$25,601.60, no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of this Commission.

7. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Granville Electric and Gas Company unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

8. That the Granville Electric and Gas Company shall for each six months' period ending December 31st and June 30th file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for the purpose specified herein during such period of the proceeds of the securities authorized and the account or accounts under the uniform systems of accounts for electrical and gas corporations to which the expenditures for such purpose have been charged.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein and if during any period no securities were sold or disposed of or proceeds expended, the report shall set forth such fact.

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9. That the fixed capital accounts of the Granville Electric and Gas Company as corrected by the journal entries which have been made by the petitioner herein as aforesaid, having been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital installed prior to December 31, 1908, and fixed capital installed since December 31, 1908, is no longer necessary, and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform system of accounts for gas and electrical corporations covering expenditures for fixed capital installed since December 31, 1908.

10. That the amount herein authorized to be debited to the account "unamortized replacement and depreciation suspense" shall be amortized by credits thereto and charges to the account "other contractual deductions from income" by the application annually of all the net income of the company to such purpose, provided that the amortization of the first named account shall not be effective until the net income of the company shall have overcome the deficit as of December 31, 1914, of \$16,161.64, shown on the corrected balance sheet of the supplement to the final report of the division of capitalization, dated September 18, 1916.

11. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no securities shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such securities be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

12. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof the said company shall file with

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this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purpose specified in this order, and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of the DEPOSIT ELECTRIC COMPANY, under Section 69, Public Service Commissions Law, for Authority to Issue \$115,000 Common Capital Stock

Case No. 5516

(Public Service Commission, Second District, September 20, 1916)

The Deposit Electric Company authorized to issue certain of its common capital stock at par for purposes specified.

The petition of the Deposit Electric Company for permission to issue certain common capital stock was filed on April 26, 1916, referred to the division of capitalization, which reported thereon June 6, 1916, and also to the electrical engineer, who filed his report July 18, 1916, and on August 31, 1916, the final report of the division of capitalization was made. Upon the petition and the said reports, the Commission authorized the company to issue \$115,000 par value of its common capital stock, to be sold at not less than par, and the proceeds thereof to be used for specific purposes set forth in the order.

By THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding dated August 31, 1916, which on the same day was sent to the corporation, such entries being listed on pages 19 to 25 inclusive

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thereof, shall be entered upon the books of the Deposit Electric Company, and that within thirty days from the service of this order verified proof shall be submitted to the Commission that such entries have been made, provided that the amount charged to land devoted to electric operations in said journal entries is not a present determination by the Commission of the amount which is properly includible in that account and that this case is hereby continued on the records of the Commission until a determination of the cost to the Deposit Electric Company of its property, chargeable to that account, is made and the books of said company made to agree with facts to the satisfaction of this Commission.

2. That the Deposit Electric Company is hereby authorized to issue \$115,000 par value of its common capital stock which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$115,000.

3. That said stock of the par value of \$115,000 so authorized or the proceeds thereof to the amount of \$115,000 shall be used solely and exclusively for the following purposes:

(a) For the discharge of first mortgage 5 per cent 30 year gold bonds outstanding at December 31, 1915, of the face value of.....		\$48,000 00
(b) For the discharge of unfunded debt outstanding at December 31, 1915, or the renewals thereof as follows:		
Bills payable	\$44,900 00	
Accounts payable	2,428 52	
Interest matured and unpaid.....	10,462 50	
Interest accrued on bonds.....	200 00	
		57,991 02
(c) For working capital.....		9,008 98
		\$115,000 00

in so far as the same may be applicable, provided:

(1) That such refunding of outstanding first mortgage bonds shall be effected within two years after the date of this order.

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(2) That such working capital shall not be disbursed by such company for purposes properly chargeable to income but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

4. That if the said stock of a total par value of \$115,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$115,000 no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without an express order of the Commission.

5. That the Deposit Electric Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the stock herein authorized and such report shall show for each of said purposes to what account or accounts under the uniform system of accounts for electrical corporations the expenditures for such purposes have been charged.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

6. That the fixed capital accounts of the Deposit Electric Company as corrected by the journal entries which have been made by the petitioner herein as aforesaid, having been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital

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installed prior to December 31, 1908, and fixed capital installed since December 31, 1908, is no longer necessary and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform system of accounts for electrical corporation covering expenditures for fixed capital installed since December 31, 1908.

7. That the uniform system of accounts for electrical corporations is hereby amended in its application to the accounts of the Deposit Electric Company in so far as is necessary so that all charges on account of retirements of fixed capital shall be charged to the account "accrued amortization of capital" heretofore created and as maintained by credits to the same and charged to "operating expenses — general amortization," as provided in the uniform system of accounts applicable to said corporation.

8. That the amount herein authorized to be debited to the account "unamortized replacement and depreciation suspense" shall be amortized by credits thereto and debits to the account "other contractual deductions from income" according to the following schedule:

Calendar Year.	Amount.
1916	\$324 30
1917	1,600 00
1918	1,600 00
1919	1,600 00
1920	1,600 00
1921	1,600 00
<hr/>	
Total	\$8,324 30
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provided that the said company is authorized to amortize the said sum more rapidly than herein provided if it so desires by crediting the account unamortized replacement and depreciation suspense and debiting the account corporate surplus with the excess so credited over the amount required as shown by the foregoing schedule.

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9. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of the order shall have been made, reported to and approved as sufficient by this Commission.

10. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of HUDSON VALLEY RAILWAY COMPANY, under Section 184 of the Railroad Law, for Approval of a Declaration of Abandonment of a Portion of its Constructed Route from Ballston Junction to Saratoga Springs

Case No. 5689

(Public Service Commission, Second District, September 20, 1916)

Electric railways — The Hudson Valley Railway Company asks for permission to abandon a portion of its main line.

The Hudson Valley Railway Company is operating its through cars between Saratoga Springs and Mechanicville over the double track line between Saratoga Springs and Ballston Spa, adjoining the main line of

Public Service Commission, Second District

the Delaware and Hudson Company. It operates only local cars hourly from 7:35 A. M. to 5:35 P. M. between Saratoga Springs and Ballston Spa, and this local trackage is what it now seeks to abandon. The line asked to be abandoned and the double track line are close together, and railway service will not be entirely done away with thereby. Application approved.

BY THE COMMISSION.—On August 30, 1916, the Hudson Valley Railway Company filed with the Commission a petition praying for the approval of the Commission to the abandonment of that portion of the main line of the corporation between Ballston Junction in the town of Milton, Saratoga county, and the highway in the city of Saratoga Springs leading from the Geyser to Saratoga lake. A hearing was held by the Commission at the court house in the village of Ballston Spa on September 14, 1916, at which time the petitioner filed proof of publication of notice of the application for permission to abandon the portion of its line aforesaid. The petitioner appeared by James McPhillips, its attorney, and the village of Ballston Spa was represented by its attorney, E. S. Coons, and the president of the village, Charles Frerkson. The petitioner showed that at the present time it is operating its through cars between Saratoga Springs and Mechanicville over the double track line between Saratoga Springs and Ballston Spa, which adjoins the main line of the Delaware and Hudson Company and that it only operates local cars hourly from 7:35 A. M. to 5:35 P. M. between Saratoga Springs and Ballston Spa over that portion of the line which it seeks to abandon. There appears to be no good reason for maintaining three tracks between Saratoga Springs and Ballston Spa for the traffic passing back and forth between these places by means of trolley cars. The line which it is proposed to abandon and the double track line now being used for through traffic by both the petitioner and the Schenectady Railway Company are not very far apart for a considerable portion of the distance between the Geyser and Ballston Spa, and people living along the line which is to be abandoned will not be entirely deprived of railway service thereby. The figures presented by the petitioner clearly showed that its old line, so called, which it now seeks to

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abandon, is being operated at a loss, and there is no reason to believe that there will ever be any substantial increase in travel along this line.

The only real objection which was made to the abandonment was by some of the people who reside at Gray's crossing, so called, who can now ride on the present line of the Hudson Valley Railway Company from that point into the village of Ballston for five cents whereas the fare from the same crossing into the village of Ballston Spa on the new line over which the cars of the Hudson Valley Railway Company will be operated and over which the cars of the Schenectady Railway Company are now operated is ten cents. This is due entirely to the location of the fare limits on the two lines. The general manager of the petitioner stated that a check had recently been made of the travel between Gray's crossing and Ballston Spa on the lines of the Hudson Valley Railway Company and the average was from four to six passengers a day.

At the present time, the people in the village of Ballston Spa by walking to a point known as Ballston Junction on the line of the Schenectady Railway Company, are able to ride to Saratoga for ten cents. If the fare limit should be extended to Gray's crossing so as to accommodate the people who use the cars at that point, the people in Ballston Spa could not conveniently walk to that fare limit and the result would be that they would be obliged to pay a five cent fare in order to take them to Gray's crossing and a ten cent fare from that point to Saratoga making the full fare fifteen cents instead of ten cents as it is now from Ballston Junction to Saratoga Springs. This would impose a serious hardship upon the people at Ballston Spa. There are several thousand residents in Ballston Spa, many of whom travel back and forth between that village and Saratoga Springs, and it would not seem reasonable to require them to pay a higher rate of fare to go to Saratoga by changing the existing fare limit to accommodate the people at Gray's crossing. It seems to be for the good of the greatest number to keep the fare limit on the lines of the Schenectady Railway Company as at present, at least, so far as the present situation is concerned.

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The papers filed by the petitioner indicate that it has complied with the requirements of section 184 of the Railroad Law of the State of New York. The abandonment of that portion of the old line of the Hudson Valley Railway Company as set forth in the petition seems to be fully justified and the Commission has determined after due deliberation that such abandonment should be approved. It is, therefore,

Ordered, 1. That the declaration of abandonment by the Hudson Valley Railway Company of that portion of its line between what is known as Ballston Junction in the town of Milton, Saratoga county, and the highway in the city of Saratoga Springs, leading from the Geyser to Saratoga lake be and the same hereby is approved.

2. That the secretary of this Commission be and he hereby is directed to indorse such approval upon the declaration of abandonment as provided in section 184 of the Railroad Law of the State of New York.

In the Matter of the Complaint of JOHN P. DRANEY, FRANK E. CALDWELL, and JOHN F. TYNAN of Poughkeepsie against CENTRAL HUDSON GAS AND ELECTRIC COMPANY, Asking that the Company Extend its Mains in Innis Avenue and Furnish Premises of Complainants With Gas

Case No. 5571

(Public Service Commission, Second District, September 26, 1916)

Authority of Commission, where a building is more than 100 feet from the line of a gas corporation, in regard to compelling service.

Manner in which Commission must exercise its discretion in such case.

Section 62 of the Transportation Corporations Law makes it the absolute duty of a gas corporation, subject to the conditions of that section, to supply gas to the owner or occupant of any building or premises within 100 feet of its mains. If the difference be more than 100 feet, the Commission may require service to be rendered if it be reasonable so to do.

On an application for an order requiring service beyond 100 feet, the Commission must determine first whether it is reasonable to require

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service to be rendered; and next, if it determines that it is reasonable to require such service, to fix the terms upon which it should be rendered. Under the particular circumstances of this case set forth in the opinion, it was ordered that service should be rendered to the complainants either by extension of mains or by laying of service pipe from the corporation's present mains, as the corporation might determine, the corporation to pay the expense, but with the right to require complainants to deposit with the corporation the estimated cost of pipe and of laying the same from the street curb to the meters to be installed on complainant's premises.

John F. Tynan, for complainants.

Leon H. Scherck, Commercial Manager of the Central Hudson Gas and Electric Company, for respondents.

IRVINE, Commissioner.—John P. Draney, Frank E. Caldwell, and John F. Tynan ask that the Central Hudson Gas and Electric Company be required to supply their premises with gas. The respondent is willing to supply them with gas, but insists that, as a condition, the complainants make certain payments as complainants may elect, either for extension of main or for purchase and laying of service pipe. This charge the complainants are unwilling to pay. The premises of complainants front on Innis avenue, in the city of Poughkeepsie, north of King street. Mr. Draney's lot abuts on King street and is about fifty feet wide on Innis avenue. The south side of his house is twelve and one-half feet north of the line of King street. Mr. Caldwell's lot is fifty feet front on Innis avenue, immediately north of Mr. Draney's lot. The center of his house is approximately fifty feet from the center of Mr. Draney's house. Mr. Tynan's premises adjoin the premises of Mr. Caldwell to the north. The center of his house is approximately eighty feet north of the center of Mr. Caldwell's house. The respondent has a four-inch main extending northward on Innis avenue to a point sixty-eight feet south of the center of King street. It is about ninety-three feet from the end of the present main to the corner of Mr. Draney's lot. It is about one hundred and five feet to a point in Innis avenue opposite the south side of his house. The other distances may be readily calculated from those already stated. There are no houses front-

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ing on Innis avenue for a considerable distance north of King street except those of the complainants, but about one-half mile farther north there is a considerable real estate development and a number of houses have already been constructed. If these are to be supplied with gas, the natural course of the main would be through Innis avenue. The premises of the complainants are on the east side of the avenue. The land on the west side, north of King street, is owned by the city and will be used for public purposes. It may be assumed that there will not in the future be any demand for gas from consumers north of King street on the west side of Innis avenue, and that in the immediate future there will be no demand from consumers on the east side north of King street except by the three complainants, unless it should be from the owners of premises in the developing territory heretofore mentioned. The consumption of gas by the three complainants is estimated at 10,000 cubic feet per year each. The tariff rate is one dollar and twenty-five cents per 1,000.

The only specific statutory provision is found in section 62 of the Transportation Corporations Law, as follows:

“ § 62. *Gas and electric light must be supplied on application.* Upon the application, in writing, of the owner or occupant of any building or premises within one hundred feet of any main laid down by any gas light corporation, or the wires of any electric light corporation, and payment by him of all money due from him to the corporation, the corporation shall supply gas or electric light as may be required for lighting such building or premises, notwithstanding there be rent or compensation in arrears for gas or electric light supplied, or for meter, wire, pipe or fittings, furnished to a former occupant thereof, unless such owner or occupant shall have undertaken or agreed with the former occupant to pay or to exonerate him from the payment of such arrears, and shall refuse or neglect to pay the same; and if for the space of ten days after such application, and the deposit of a reasonable sum as provided in the next section, if required, the corporation shall refuse or neglect to supply gas or electric light as required, such corporation shall forfeit and pay to the applicant the sum of ten dollars, and the further sum of five dollars for every day

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thereafter during which such refusal or neglect shall continue; provided that no such corporation shall be required to lay service pipes or wires for the purpose of supplying gas or electric light to any applicant where the ground in which such pipe or wire is required to be laid shall be frozen, or shall otherwise present serious obstacles to laying the same; nor unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion."

The Commission has held that this imposes an absolute obligation upon the gas company to furnish service, subject to the conditions expressed, within 100 feet of its main, and that beyond that distance the Commission may require service to be rendered upon reasonable conditions. *Simpson v. Buffalo Gas Company*, 2 P. S. C., 2d D., N. Y. 531. The last clause of the section quoted provides that the corporation shall not be required to lay service pipes "unless the applicant, if required, shall deposit in advance with the corporation a sum of money sufficient to pay the cost of his portion of the pipe or wire required to be laid, and the expense of laying such portion." What the consumer's portion shall be is nowhere defined, but the statute evidently contemplates that some portion of the expense shall be borne by the consumer. It follows that whether the distance be more or less than 100 feet, the Commission has authority to require service to be furnished if it be reasonable so to do and upon reasonable terms. If the consumer is expected to pay any portion of the expense within 100 feet, he should be expected to pay some portion of the expense if he is more than 100 feet from the main. The portion by him to be paid is not fixed by law, so that in case of controversy it becomes the duty of the Commission to determine what portion is reasonable. In *Simpson v. Buffalo Gas Company*, supra, it was held that a reasonable division is that the company pay the cost of the pipe and the laying of the same from the main to the curb, and the consumer from the curb to the meter. In general, but subject to exception under special circumstances, that division of the cost, for the reasons stated in the Buffalo case by Commis-

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sioner Olmsted, is fair and equitable. We think that in cases beyond the 100 feet limit the Commission must determine, first, whether it is reasonable to require service to be rendered; and next, upon what terms it should be rendered. Within the 100 feet the only question is as to the portion of the cost of pipe and laying the same to be borne by the consumer.

In this case the Commission is of opinion that the complainants may reasonably demand that service be given, and the respondent practically concedes this by its offer to furnish service on terms which if they be not reasonable are certainly not prohibitive. The complainants' premises are on a street supplied to within a short distance by means of a four-inch main. Mr. Draney is immediately across a street, the occupants of houses on the other side of which are already supplied. The distance from Mr. Draney's premises to the premises of the other complainants are common distances between houses in a city of the class of Poughkeepsie. The probable consumption, while not promising great remuneration to the company, is not inconsiderable. Gas corporations in the performance of their public duties must and do, and this company undoubtedly does, furnish its service to a number of consumers under like conditions.

In determining upon what conditions the service should be rendered, a more difficult question is presented. The respondent submitted to the complainants two propositions: One was that the complainants should pay \$270 which should be reimbursed by credits for gas consumed during a period to be mutually agreed upon; the other was that instead of extending the four-inch main as contemplated by the first proposition, it would extend a two-inch service pipe to be paid for absolutely by the complainants. There was later a third proposition, to extend pipe upon a guarantee of \$48 a year consumption by each consumer.

The tariff of the company filed with the Commission, P. S. C., 2 N. Y. No. 1, contains the following:

"Whenever the company is called upon to extend its mains
* * * the company shall be entitled to increase the consumer's guarantee or to make adequate charge to offset expenditures involved. No positive rule can be given as each case must be

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determined on its individual merits. * * * The company will charge for gas service pipe installation from main to meter, not exceeding cost thereof."

It may be assumed that the calculations upon which the propositions were made were based upon the cost of extension of main and the cost of service pipe from the present main, and were therefore based upon the public tariff of the company. We think, however, that this tariff, so far as it imposes upon the consumer the cost of service pipe from main to meter, is not reasonable, and that consumers should pay only for cost of pipe and cost of laying the pipe from curb to meter. It is quite true that in the matter of extensions it is not practicable to lay down any general rule, and the company's tariff, recognizing that fact and making the cost depend upon the "individual merits" of the case, is proper.

In the present case the service may be rendered either by extending the main along Innis avenue in front of the premises of the complainants and then laying service pipes, or by laying service pipe sufficient to supply service to all three consumers from the end of the present main. It should be left to the company to determine which of these methods it should pursue. Under the particular facts of this case it is reasonable to require that service be rendered the complainants, and that by some method the respondent shall, at its own expense, lay a pipe or pipes to points in front of complainants' premises, and that it bear the expense of purchasing and laying such pipe or pipes; but that, as a condition of so doing, it may require the complainants to deposit with the company the estimated cost of pipe and laying the same from the curb in Innis avenue to the meters to be installed on complainants' premises.

All concur.

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In the Matter of the Petition of the TOWN BOARD OF THE TOWN OF ESPERANCE, SCHOHARIE COUNTY, UNDER SECTION 91 of the Railroad Law, for an Order Determining that two Highway Grade Crossings of the Albany and Susquehanna Railroad (leased to and operated by the Delaware and Hudson Company) in said Town shall be Closed and Discontinued, and a New Piece of Highway and an Undercrossing of said Railroad be Constructed

Case No. 5687

(Public Service Commission, Second District, October 5, 1916)

Elimination of grade crossing at Esperance, Schoharie county.

The Delaware and Hudson Railroad is crossed in the town of Esperance by two highways, 520 feet apart. These crossings are both at grade. It is sought to close, on the petition of the town board of Esperance, both existing grade crossings and to substitute therefor an under grade crossing with the necessary approaches.

BY THE COMMISSION.—In the town of Esperance, Schoharie county, the Delaware and Hudson Company's railroad is crossed by two highways at grade, the crossings being approximately 520 feet apart. From the points of crossing, the two highways converge on the east side of the tracks to a junction point from which the combined highway continues in a southerly direction. West of the tracks the highways continue to diverge. The two crossings are known as the "double crossings," and are referred to in a petition under section 91 of the Railroad Law filed by the town board of the town of Esperance asking for their elimination.

It is proposed to close both crossings and divert all traffic to an undergrade crossing to be built about 180 feet south of the most southerly of the two grade crossings, and to construct the necessary approaches and new highways all as shown on a plan hereinafter referred to.

Upon this petition the Commission, after due notice as required by statute to the railroad company, to the town board, and to the property owners in interest, held a public hearing on September 25, 1916, at which time proof of personal service of such notice on interested property owners was made; proof of publication of

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notice having been made since by the railroad corporation. Peter I. Enders, supervisor, appeared at this hearing for the town of Esperance; and John E. MacLean, attorney, and W. H. Adley, office engineer, for the Delaware and Hudson Company.

There was no opposition to the request for the closing of these crossings. A copy of a contract between the town board of the town of Esperance and the Delaware and Hudson Company was filed, by the terms of which the town board agrees that the town will purchase all land necessary for a change of the highways, and the railroad company agrees that it will construct the undergrade crossing and the new highways necessary to divert traffic thereto. At the hearing, the town board stated that it would not only purchase the land but also make payment therefor at its own cost and expense, and the railroad company likewise stated that it would construct the new undergrade crossing and highways and make payment therefor at its own cost and expense. Upon this understanding, the Commission hereby determines that the two crossings shall be abolished in the interest of public safety; and it is therefore

Ordered: 1. That the two grade crossings, known as the "double crossings," of the tracks of the Delaware and Hudson Company's railroad in the town of Esperance, Schoharie county, be closed and discontinued, and that traffic be diverted therefrom by means of new highways and an undergrade crossing to be constructed, the crossing to be located at a point approximately 180 feet south of the most southerly of the two grade crossings.

Beginning in the highway about 250 feet south of the highway junction heretofore referred to on the east side of the tracks, a new highway shall be laid down upon the following described center line: Curving to the left on a 50-foot radius from the above named point of beginning a distance of about 55 feet; thence tangent a distance of about 412 feet across and to the west side of the railroad; thence curving to the right on a compound curve, the first radius being 133 feet, the second 320 feet, the respective curve lengths being about 150 feet and 140 feet, to and across the highway leading to the most southerly crossing; thence

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tangent a distance of about 900 feet to a junction with the highway leading to the most northerly of the two crossings.

The new crossing shall extend under the two existing tracks and a third track now under construction. It shall be about 26 feet 10 inches wide between undercoping lines; the vertical clearances above the crown of the roadway shall be a minimum of 13 feet, and the plate girder superstructures in one span shall carry solid floors.

From the point of beginning of the described center line of the new highway to be laid out, the grades on said new highway shall be as follows: Descending westerly toward the track at the rate of 5 per cent a distance of about 400 feet; thence level or approximately level a distance of about 50 feet; thence ascending at the rate of 5 per cent a distance of about 300 feet; thence ascending at the rate of 0.33 per cent a distance of about 270 feet; thence level a distance of about 300 feet; thence descending at the rate of 4.4 per cent a distance of about 180 feet; all changes in rates of grade to be connected by means of vertical curves.

The layout of the existing highways, the location of the proposed undergrade crossing and new roadways to be constructed, and the grades are to be in accordance with and as shown upon a general plan on file with this Commission, marked "Public Service Commission, Second District, Sept. 25, 1916, Respondent's Ex. No. 3;" said plan bearing the approval signature of the town clerk of the town of Esperance, its title being as follows: "Delaware and Hudson Co., Susquehanna Division, Elimination of Double Crossing by Proposed Underpass About 1.2 miles north of Schoharie Jct. Office of Chief Engineer. Scale 1"=50'. Albany, N. Y., July 10, 1916."

The new highways shall be constructed to a width of twenty-four feet on embankments and a width of twenty-six feet in cuts, and in the center of these sections there shall be laid a water-bound macadam pavement in a manner satisfactory to the town board of the town of Esperance and to this Commission.

Drainage of the subway shall be to a drainage ditch crossing the

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railroad at present in a culvert at the site of the proposed under-grade crossing. This culvert, if necessary, shall be relocated and reconstructed.

Either one of the two existing grade crossings shall be left open, or a temporary crossing at grade at another location shall be provided and maintained until the completion and acceptance by this Commission of the work herein ordered.

2. That in pursuance of the aforesaid agreement between the Delaware and Hudson Company and the Town of Esperance, the parties thereto shall pay and discharge the entire cost of construction and of any land or damages whatsoever and of the taking of any rights or easements which may be necessary in the premises: this order being granted upon the express condition that no financial liability or obligation on account of the construction and work herein provided for and authorized shall attach to or fall upon the State of New York, and that all costs of whatever nature and to whatsoever amount shall be charged against, be payable, and paid by the Delaware and Hudson Company and the Town of Esperance.

In this order the Delaware and Hudson Company's railroad is considered to lie in a northerly and southerly direction.

In the Matter of the Petition of the SCHENECTADY POWER COMPANY for Authority to Issue Common Capital Stock

In the Matter of the Supplemental Petition, and Petition of the GENERAL ELECTRIC COMPANY under Section 70

Case No. 5446

(Public Service Commission, Second District, October 5, 1916)

Petition and supplemental petition for leave to issue common capital stock.

The original petition herein was filed February 25, 1916, and was referred to the capitalization division, which reported thereon June 30, 1916. The electrical engineer, on July 20, 1916, also reported, and a formal hearing was held as to this matter on August 2, 1916, and on

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September 6, 1916, a supplemental petition was filed, and the final report of the division of capitalization thereon was made under date of September 15, 1916.

By the Commission.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding dated September 15, 1916, which on the same day was sent to the corporation, such entries being listed on pages 15 to 17 inclusive, thereof, shall be entered upon the books of the Schenectady Power Company, and that within thirty days from the service of this order verified proof shall be submitted to the Commission that such entries have been made.

2. That the Schenectady Power Company is hereby authorized to issue \$300,000 par value of its common capital stock which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$300,000.

3. That said stock of the par value of \$300,000 so authorized or the proceeds thereof to the amount of \$300,000 shall be used solely and exclusively for the following purposes:

- (a) For the discharge of miscellaneous accounts payable outstanding at January 31, 1916, as shown on balance sheet as of that date on page 7 of the final report of the division of capitalization herein, dated September 15, 1916, or the renewals thereof. \$12,282 58
- (b) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of fixed assets during the period from February 28, 1911, to January 31, 1916, not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation 190,169 50
- (c) For working capital. 98,536 92

\$300,989 00

Amount unprovided for. \$989 00

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in so far as the same may be applicable provided that such working capital shall not be disbursed by said company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

4. That the Schenectady Power Company shall for each six months' period ended December 31st and June 30th file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended during such period of the proceeds of the stock herein authorized for subdivision (a) of ordering clause No. 3 hereof, and the account or accounts under the uniform system of accounts for electrical corporations to which the expenditures for such purpose have been charged.

(f) The amount used during such period of the proceeds of the stock herein authorized for subdivisions (b) and (c) of ordering clause No. 3 hereof.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended and used in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended and used, the report shall set forth such fact.

5. That the acquisition by the General Electric Company prior to the filing of the petition herein of 3,561 shares of the common capital stock of the Schenectady Power Company, and its predecessor, Schaghticoke Electric Company, of the par value of \$100 each, aggregating a total par value of \$356,100, is hereby approved, and the General Electric Company is hereby authorized to acquire 1,439 additional shares of stock heretofore issued by said Schenectady Power Company or its predecessor, Schaghti-

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coke Electric Company, aggregating a total par value of \$143,900.

6. That the Schenectady Power Company is hereby authorized to sell the 3,000 shares of the par value of \$100 each, aggregating a total par value of \$300,000 of common capital stock herein authorized to be issued, to the General Electric Company, and the General Electric Company is hereby authorized to acquire and hold such stock of the Schenectady Power Company so authorized.

7. That the fixed capital accounts of the Schenectady Power Company as corrected by the journal entries which have been made by the petitioner herein as aforesaid, having been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital installed prior to December 31, 1908, and fixed capital installed since December 31, 1908, is no longer necessary, and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform system of accounts for electrical corporations covering expenditures for fixed capital installed since December 31, 1908.

8. That the uniform system of accounts for electrical corporations is hereby amended in its application to the accounts of the Schenectady Power Company in so far as is necessary so that all charges on account of retirements of fixed capital shall be charged to the account "accrued amortization of capital" heretofore created and as maintained by credits to the same and charges to "operating expenses -- general amortization" as provided in the uniform system of accounts applicable to said corporation.

9. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with

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the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

10. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days from the service hereof, the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of the TROY AND GREENBUSH RAILROAD ASSOCIATION for Leave to Sell Shares of its Capital Stock held in its Treasury

Case No. 5627

(Public Service Commission, Second District, October 5, 1916)

Permission sought to sell certain stock of the Troy and Greenbush Railroad Association stock.

The petitioner was incorporated in 1845 with \$200,000 capital stock, which was subsequently increased to \$275,000. In 1851, the property of the road was leased to the Hudson River Railroad Company, which preceded the New York Central Railroad Company. A portion of the original capital stock was never issued; the present application is for authority to sell 100 shares of capital stock at 160 per cent at par. Permission granted with the usual restrictions.

Petition filed July 6, 1916.

Hearing held July 31, 1916.

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By THE COMMISSION.—The Troy and Greenbush Railroad Association was incorporated in 1845 with a capital stock of \$200,000, which was subsequently increased to \$275,000. Under date of February 3, 1851, all of the property and franchises of the association, except a small amount of cash on hand, were leased to the Hudson River Railroad Company, a predecessor corporation of the New York Central Railroad Company, in perpetuity, the annual rental being \$19,250. Of the \$275,000 par value of capital stock authorized, twelve shares of \$50 par value each, have never been issued except that a certificate was executed which recited that the Troy and Greenbush Railroad Association was the owner of said twelve shares of capital stock, and since the lease of the property the petitioner from time to time purchased in the open market eighty-eight shares, each of the par value of \$50, of its capital stock.

The present petition is for authority to sell these 100 shares of capital stock at 160 per cent of par and to invest the proceeds realized from such sale for the benefit of a working fund to be devoted to the petitioner's proper corporate needs.

Now, therefore, upon the foregoing record, ordered as follows:

1. That the Troy and Greenbush Railroad Association is hereby authorized to issue 100 shares, each of the par value of \$50, aggregating a total par value of \$5,000, of its common capital stock, which shall be sold at a price not less than 160 per cent of its par value to realize net proceeds of \$8,000.

2. That the proceeds realized from the sale of such stock shall be used as a fund for the benefit of the organization of the Troy and Greenbush Railroad Association or for other of its capital purposes, and such proceeds may be invested in the securities of other corporations.

3. That the Troy and Greenbush Railroad Association shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

- (a) What stock has been sold during such period in accordance with the authority contained herein and the date of such sale.

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- (b) To whom such stock was sold.
- (c) What proceeds were realized from such sale.
- (d) Any other terms and conditions of such sale.
- (e) In detail the amount expended of the proceeds of the stock herein authorized for the purpose specified herein.

Such reports shall continue to be filed until all of said stock shall have been sold and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or proceeds expended, the report shall set forth such fact.

4. That the Troy and Greenbush Railroad Association shall within thirty days from the service of this order advise this Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purpose specified in this order and that such purpose is not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Complaint of the FULTON LIGHT, HEAT AND POWER COMPANY against GRANBY PULP AND PAPER COMPANY; ARROW HEAD MILLS, INC.; OSWEGO RIVER POWER TRANSMISSION COMPANY; NIAGARA, LOCKPORT AND ONTARIO POWER COMPANY; and NELSON L. WHITAKER, as to alleged violation of law, particularly the Public Service Commissions Law

Case No. 5532

(Public Service Commission, Second District, October 10, 1916)

Public Service Corporations Law, subdivision 13 of section 2, how construed. Distinction between manufacturing corporation and electrical corporation. Electric current generated by grantee for his individual use is without the statute.

Subdivision 13 of section 2 of the Public Service Commissions Law defining electrical corporations is to be construed in connection with section 1 and all other provisions of the law.

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So construed, a manufacturing corporation does not assume to act as an electrical corporation by generating electric current solely for its own use and transmitting it across a street or across other public property.

A permit granted by municipal authorities to maintain a wire or wires across a public street, or by the Superintendent of Public Works to maintain such a wire over State lands, for the purpose solely of transmitting current generated by the grantee for his own use, is not such a franchise as requires the consent of the Public Service Commission to its exercise.

Gannon, Spencer & Mitchell (by Mr. Gannon); G. M. Fanning, and C. A. Collin, for Fulton Light, Heat and Power Company, complainant.

George M. Burt, for Granby Pulp and Paper Company.

Visscher, Whalen & Austin (by Mr. Whalen), for Arrow Head Mills, Inc., and Nelson A. Whitaker.

Eugene M. White, for Oswego River Power Transmission Company.

Strebel, Corey, Tubbs & Beals (by Warren Tubbs), for Niagara, Lockport and Ontario Power Company.

IRVINE, Commissioner.—This complaint of the Fulton Light, Heat and Power Company against the several respondents named in the caption apparently originated under a misapprehension as to the facts, but it has continued under what the Commission believes to be a misapprehension of the law.

The Fulton Light, Heat and Power Company is in the exercise of franchises for furnishing light, heat, and power in the city of Fulton. The complaint is framed upon the theory and in brief charges that the Granby Pulp and Paper Company, claiming to be the owner of certain water-power in the Oswego river, has entered into arrangements with some or all of the other respondents whereby a transmission line is to be constructed across a highway in the city of Fulton, and over certain lands belonging to the State and constituting a part of the canal system, for the purpose of transmitting and distributing electric current

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and power to be generated by the Granby Pulp and Paper Company and to be supplied to all or some of the respondents. The Granby Pulp and Paper Company and the Arrow Head Mills, Inc., are manufacturing corporations. The Oswego River Power Transmission Company and the Niagara, Lockport and Ontario Power Company are electrical corporations, but without authority to sell or distribute electricity in the city of Oswego. The prayer is "that said parties be summoned to appear before your honorable body with a view to securing relief to which it [the complainant] is entitled."

On the hearing it appeared that there is, near the Oswego river, in the northerly part of the city of Fulton, a paper mill formerly belonging to the Battle Island Pulp and Paper Company. This property was sold at judicial sale to N. L. Whitaker, one of the respondents. A water-power formerly used by the Battle Island Company was made unavailable by barge canal construction, and the Granby Pulp and Paper Company leased certain land and water-power rights in the southern part of the city of Fulton to Whitaker. Whitaker obtained the consent of the board of public works of the city of Fulton to construct a transmission line under a bridge whereby Oneida street, a public street in the city, is carried across the Oswego river. The proposed transmission line would extend from the proposed power house, over lands of the Granby Pulp and Paper Company, under this bridge, to lands of the State, and over such land to the property formerly belonging to the Battle Island Company. Consent of the superintendent of public works was obtained for the construction of a transmission line over the state land. Whitaker transferred the pulp mill, the lease from the Granby Pulp and Paper Company, and the rights, such as they may be, obtained from the board of public works of the city, and the Superintendent of Public Works of the State, to the Arrow Head Mills, Inc. It was stipulated on the hearing on behalf of the Arrow Head Mills, Inc., that the transmission line "is to be used exclusively for the purpose of transmitting electricity by the Arrow Head Mills, Inc., on its own line to its own plant, strictly and solely for its own use and its own purpose, and no other; and

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that no other electricity shall be transmitted over this line except what is generated at that plant," under the lease from the Granby Pulp and Paper Company aforesaid. Whitaker's position is merely that of the original lessee and grantee of the privileges mentioned, and he has transferred them to the Arrow Head Mills, Inc. The Oswego River Power Transmission Company and the Niagara, Lockport and Ontario Power Company disclaimed any relation with the transaction, and any existing or contemplated contract or arrangement with any of the other parties. The contention of the complainant under the facts thus developed resolves itself into the following proposition, stated by the sitting Commissioner at the hearing and accepted by the complainant as a correct statement:

"A person or corporation generating electricity for its own use endeavors to become an electrical corporation within the meaning of the Public Service Commissions Law if his line crosses public property; and further, that in this case the crossing as indicated under this bridge is a crossing of a street, and the carrying of your line along state land is not carrying over private property but over public property."

It may be assumed that the crossing under the bridge is a crossing of a street, and that carrying the line over state land is not carrying it over private property. It may also be assumed that a corporation, in order to exercise the powers conferred upon electrical corporations within the meaning of the Public Service Commissions Law, must be incorporated under the Transportation Corporations Law. If it is conceded that the Arrow Head Mills, Inc., is not so incorporated. The questions to be determined are therefore —

1. Whether the proposed construction and operation are *ultra vires* of the Arrow Head Mills, Inc., so that it cannot accept a franchise of privilege for the proposed construction; and

2. Whether the privileges accorded by the board of public works of Fulton, and the Superintendent of Public Works of the State, are such franchises or privileges as require the approval of the Commission under section 68 of the Public

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Service Commissions Law as a condition precedent to their exercise.

Section 2, subdivision 13, of the Public Service Commissions Law, is as follows:

"13. The term 'electrical corporation,' when used in this chapter, includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others."

This subdivision, taken by itself, would be susceptible of the construction that the phrase "solely on or through private property" relates to use "for railroad or street railroad purposes," and is not to be connected with the following phrase "for its own use or the use of its tenants and not for sale to others." Known facts in connection with the history of the legislation would support this construction. However, subdivision 11, defining a "gas corporation," declares that the term "includes every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, owning, operating or managing any gas plant except where gas is made or produced and distributed by the maker on or through private property solely for its own use or the use of its tenants and not for sale to others." Subdivision 22, defining a "steam corporation," is in similar language.

Standing on the definition alone, it would therefore seem that instantly a manufacturing corporation strung a wire across a public alley for the purpose of transmitting electric current from one of its buildings to another and for its private use, it assumed to act as an electrical corporation; that, not being incorporated under the Transportation Corporations Law, such act would be *ultra vires*; and that such simple and not uncommon operation

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could perhaps, be legalized only through the device of a separate corporation. It would also follow that an individual owning buildings on both sides of such a public alley could not supply the one with electric light from current generated by himself in the other without becoming an electrical corporation, obtaining the consent of this Commission, filing reports and tariffs, and doing other things absolutely absurd in the circumstances. We should not attribute to the Legislature the intent to produce such results unless such intent is plainly manifest from consideration of the entire act and indeed of all existing legislation relevant to the subject.

Section 1 of the Public Service Commissions Law is as follows:

"This chapter shall be known as the 'Public Service Commissions Law,' and shall apply to the public services herein described and to the commissions hereby created."

Section 2 is a section of definitions, including those already quoted. In its 5th subdivision, in defining a street railroad, it restricts such definition to roads "for public use in the conveyance of persons or property for compensation." Subdivision 6, defining railroads, and subdivision 9, defining common carriers, contain the same restrictions. Subdivision 11, defining gas corporations, does not. Subdivisions 17 and 19, defining respectively telephone corporations and telegraph corporations, restrict the definitions to such persons or corporations as transact the business defined "for hire." Subdivisions 22 and 23, defining steam corporations and stock yards, do not contain similar restrictions. Some of the subdivisions making definitions omitting all reference to public use have been added since the act was originally passed. The others have been amended. While it might be argued with considerable force that the insertion of restrictive words such as "for public use" or "for hire" in some definitions, and their omission in others, indicated a legislative intent to embrace all enterprises of the latter class whether for public service or not, a consideration of other features of the law rebuts any such inference. Section 1 says that the law shall apply to the "public services herein described;" so at the outset public service and not private use is made the subject of the act. All the provisions of the act relate to public service.

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Article 4, relating to gas corporations and electrical corporations, begins with section 64, providing that "This article shall apply to the manufacture and furnishing of gas for light, heat or power and the furnishing of natural gas for light, heat or power, and the generation, furnishing and transmission of electricity for light, heat or power." Manufacturing or furnishing for or to whom? The subsequent sections answer the question. Section 65 requires gas corporations and electrical corporations to provide safe and adequate service at just and reasonable prices, without unjust discrimination or preference. Section 66 gives the Commission authority to supervise such corporations and their instrumentalities; to fix standards for measuring the purity of gas, and for investigation of the efficiency of gas and electric plants; to prescribe methods of keeping accounts, and to require the filing of detailed reports; to require gas corporations and electrical corporations to file with the Commission and to keep open to public inspection schedules showing all rates and charges. Section 67 provides for the inspection of gas and electric meters; section 69 for the approval of stock, bonds, and other forms of indebtedness.

Without continuing this review, it is sufficient to say that every section is framed with a view to the public character of the service rendered by the corporation and to the protection of the public with reference thereto. We might review other articles relating to other classes of corporations and the result would be precisely the same. It may be within the power of the Legislature to provide for the minute regulation of boilers and pipes for the purpose of heating a private building by steam, or of an interior telephone plant for the purpose of affording communication between different parts of the same factory. If, however, the Legislature saw fit to exercise such power, it would not be by the requirement of financial reports and published tariffs, or inhibition of unjust discrimination. The very name of the law restricts it to public service, and the first section confines its operation to the public services to be defined in section 2. Every definition in section 2 must be read in connection with the first section and the avowed and evident purpose of the act. We therefore conclude that the Arrow Head Mills, Inc., does not assume to act as

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an electrical corporation in generating its own electric current for its own use merely because of the fortuitous circumstance that its transmission line must pass under a public bridge and over state land.

What has already been stated answers in substance the second question. By enacting the Public Service Commissions Law, the Legislature did not intend to create a body to supervise municipal authorities in their control of public streets, or state officers in the control of lands under their authority. The requirement for the approval of franchises was inserted only in connection with the regulation intended by the act of persons or corporations engaged in public service. If the municipal authorities should grant a license or consent to carrying a pipe under a public street for the purpose of supplying a house on one side with water taken from a well on the other, the Commission would have no authority in the premises. If an electrical corporation, in erecting a new building for its offices, should obtain the consent of the municipality to construct a marquee over the sidewalk of a street, the Commission would be equally unconcerned. It is the public use or public purpose that brings the transaction within the control of the Commission, and not the fact that public property is used for an entirely private service. The service here contemplated is strictly private. It has no public aspect, and this Commission cannot concern itself over any use that the city of Fulton or the superintendent of public works may permit of city streets or state property when such use has no connection with the purpose for which the Public Service Commissions Law was passed.

The complaint, as already shown, contains no specific demand for relief. It is unnecessary to inquire what relief in other circumstances might be accorded. In the circumstances disclosed in this case, no relief whatever can be given. If subsequently the line should come to be used for public purposes, the authority of the Commission may then be invoked.

All concur.

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In the Matter of the Petition of the MOHAWK GAS COMPANY of Schenectady under Section 69, Public Service Commissions Law, for Authority to Issue \$574,800 Common Capital Stock; and under section 70 as to the SCHENECTADY ILLUMINATING COMPANY Acquiring This and Other Unissued Stock of this Petitioner; and Petition of the SCHENECTADY ILLUMINATING COMPANY Under Section 70

In the Matter of the Supplemental Petition of MOHAWK GAS COMPANY of Schenectady

Case No. 5611

(Public Service Commission, Second District, October 10, 1916)

Permission granted a gas company at Schenectady to issue certain par value of its common capital stock to be sold and proceeds utilized for certain specific purposes.

The petition herein was filed June 23, 1916, and details of the fixed capital of petitioner and its expenditures during the period from 1913 to 1916, inclusive, were filed from June 23, 1916. The capitalization division reported on the application July 24, 1916, and the gas engineer reported August 4, 1916. An amendatory petition was filed August 7, 1916, and the final report of the division of capitalization thereon was made August 10, 1916. A second amendatory petition was filed September 6, 1916, and a supplement to the final report of the division of capitalization was made under date of September 16, 1916. The application herein is for permission for the Mohawk Gas Company to issue \$499,800 par value of its common capital stock, to be sold at a price not less than par, and the proceeds to be used for the payment of bills and accounts owing to system corporations, and for the reimbursement of the petitioner's treasury for moneys actually expended from income for the acquisition of fixed assets during the period from 1913 to 1915.

BY THE COMMISSION.—Now, therefore, upon the foregoing record, ordered as follows:

1. That the proposed journal entry contained in the final report of the division of capitalization in this proceeding dated August 10, 1916, as amended by the supplement thereto dated September 16, 1916, copies of which reports were sent to the corporation, such entry being listed on page 8 of the former, shall be entered upon the books of the Mohawk Gas Company, and that within

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thirty days from the service of this order verified proof shall be submitted that such entries have been made.

2. That the Mohawk Gas Company is hereby authorized to issue \$499,800 per value of its common capital stock which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$499,800.

3. That said stock of the par value of \$499,800 so authorized or the proceeds thereof to the amount of \$499,800 shall be used solely and exclusively for the following purposes:

(a) For the discharge of obligations outstanding at December 31, 1915, or the renewals thereof, as follows:

1. Bills and accounts owing to system corporations	\$235,584 35	
2. Miscellaneous accounts payable	17,103 45	
3. Interest accrued.....	1,385 96	
		<u>\$254,073 76</u>

(b) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of fixed assets during the calendar years 1913 to 1915 inclusive not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation.....

\$245,806 49

\$499,880 25

Amount unprovided for..... \$80 25

4. That if the said stock of a total par value of \$499,800 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$499,880.25, no portion of the proceeds of such sale in excess of the last aforesaid sum, to wit the aggregate of items (a) and (b) of ordering clause No. 3 hereof, shall be used for any purpose without the further order of the Commission.

5. That the Mohawk Gas Company shall for each six months'

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period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold, or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended during such period of the proceeds of the stock herein authorized for subdivision (a) of ordering clause No. 3 hereof and the account or accounts under the uniform system of accounts for gas corporations to which the expenditures for such purpose have been charged.

(f) The amount used during such period of the proceeds of the stock herein authorized for subdivision (b) of ordering clause No. 3 hereof.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended and used in accordance with the authority contained herein and if during any period no stock was sold or disposed of or proceeds expended and used, the report shall set forth such fact.

6. That the Mohawk Gas Company is hereby authorized to sell the 4,998 shares each of the par value of \$100, aggregating a total par value of \$499,800 of common capital stock herein authorized to be issued, to the Schenectady Illuminating Company, and the Schenectady Illuminating Company is hereby authorized to acquire and hold such stock of the Mohawk Gas Company so authorized; and the Schenectady Illuminating Company is also authorized to acquire and hold \$870,300 par value of common capital stock of the Mohawk Gas Company authorized to be issued by order entered under date of April 27, 1916, in Case No. 2690.

7. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued

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or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

8. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days of the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Complaint of the LOCKPORT BOARD OF COMMERCE, against THE NEW YORK CENTRAL RAILROAD COMPANY and INTERNATIONAL RAILWAY COMPANY, as to Better Connections Between Passenger Trains on said Railroad at Burt, Niagara county

Case No. 5281

(Public Service Commission, Second District, October 10, 1916)

Better connections between passenger trains on the New York Central Railroad and the International Railway at a station known as Burt, Niagara county, asked for.

Burt is on the Ontario division of the New York Central Railroad, about eleven miles from Lockport, and is also a station on the International Railway, which runs between that city and the village of Olcott, about twelve miles, and which passes through Burt and crosses the New York Central tracks under grade. Both the New York Central and

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International Railway Company have stations at Burt, such stations being about 1,900 feet apart. This application is for the New York Central to provide within its right of way a convenient path to the other station. Improvements ordered made and a shelter house at the crossing directed to be provided.

BY THE COMMISSION.—This case is brought before the Commission upon the complaint of the Lockport Board of Commerce against the New York Central Railroad Company and the International Railway Company as to the connections between passenger trains on said railroads at a station known as Burt in the county of Niagara; and various hearings having been held by the Commission in this case, at which Roy H. Ernst, corporation counsel of the city of Lockport, and Charles Hickey of Lockport, appeared as attorneys for the complainants; Mr. W. A. Williams, the president of the Lockport Board of Trade, John R. Earl, mayor of the city of Lockport, John Hoenig and John J. Burtt, aldermen of the city of Lockport, William A. Dickinson, secretary of the Board of Commerce, and many other members of said board appeared in behalf of the complainants; Morris Cohn of Niagara Falls appeared as attorney for the International Railway Company and Maurice C. Spratt of Buffalo, appeared as attorney for the New York Central Railroad Company; at said hearings certain proceedings were had and proofs taken, from which proofs and proceedings it satisfactorily appears to the Commission that the New York Central Railroad operates a steam railroad from Niagara Falls to Oswego, which is known as the Ontario division of the New York Central Railroad, which passes through Burt in an easterly and westerly direction about eleven miles from the city of Lockport; that the International Railway Company operates an electric line between the city of Lockport and the village of Olcott, a distance of about twelve miles, which line passes through Burt and crosses the New York Central tracks by an under pass; that said under pass is in a cut under the New York Central Railroad about 16 feet deep; that the International Railway Company now maintains its station for Burt at a point 1,100 feet from said crossing, and that likewise the New York Central maintains its station about 870 feet from such crossing; that there is consider-

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able passenger traffic from points along the New York Central road desiring to go to Lockport and Olcott and who make the change to the International at Burt; in a similar manner people from Lockport and Olcott and other points along the International line, desiring to reach points along said New York Central Railroad make the change at Burt, and in all such cases passengers are required to walk the distance from one station to the other; at the hearings this condition was conceded by all parties to be inconvenient and various plans have been suggested by said parties to remedy the same; it appears that there is ample room within the right of way of the New York Central from its station to such crossing to construct and maintain a convenient path to be used by passengers making such change, it was also shown that either at the top of the bank or in the cut by the side of the International Railway Company's tracks a satisfactory shelter station could be erected and maintained; the complainant herein asks that all passenger trains and cars of both railroads stop at such crossing, and the International Railway is willing to comply with that request, but the New York Central Railroad Company deems it unreasonable to stop its passenger trains at said crossing after having stopped at the station only 870 feet away; that if said shelter station be built on a level with the International Company's tracks, a platform should be constructed in connection therewith, and a stairway leading up to the top of the bank and to connect with such path should also be constructed; with these improvements the complainants would be satisfied; and it appears to the Commission that the same are in all respects required for the security and convenience of the traveling public; and the chief of the division of steam railroads of this Commission having personally inspected the said crossing and the physical conditions relating thereto, and having duly made his report in writing to the Commission under date of October 3, 1916, whereby it appears that it is entirely feasible to provide physical means of interchange for passengers between the said railroads at the said crossing, and the recommendation of the said report being that the said interchange facilities should be installed accordingly, by

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the joint action of the said New York Central Railroad Company and the said International Railway Company;

It is therefore hereby determined that the said the New York Central Railroad Company and the International Railway Company be notified, by a service upon each of them of a copy of this determination, that this Commission requires and directs that the following repairs, improvements, changes and additions shall be made at said crossing of the two railroads of the respondents at Burt, Niagara county, and that the same shall be made at the joint cost of said corporations, the division thereof to be agreed upon, fixed and determined by an agreement between the said corporations to be made and entered into within thirty days from the time of the service of a copy hereof upon them, and that within the said period of thirty days the said corporations shall file with the Commission a statement that such an agreement has been made between them for a division or apportionment of the cost of such repairs, improvements, changes or additions at said crossing;

That said repairs, improvements, changes and additions for said interchange at said crossing are hereby specified as follows:

A shelter house not less than twelve feet long and eight feet deep shall be erected, placed and maintained in the southeast corner of the land of the New York Central Railroad Company; that this shelter shall be closed on the west and south sides excepting for a doorway in the west side at the mid point; that the roof of the overhanging type, common to such shelters, shall be provided with sufficient overhang to protect from storms from the east; that a stairway not less than four feet wide, with open treads, and a suitable railing be provided and maintained, which shall lead from the shelter house to a platform to be constructed at the foot of the slope of the cut on the International Railway, such platform to be not less than twenty-five feet in length and six feet in width; that the platform be located at such point as will be best suited to the operating and physical conditions on the International Railway, but that the stairs shall be located as near the southerly line of the right of way of the New York Central as

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possible, in order that the number of steps shall be kept to a minimum; that a cinder path not less than four feet in width be constructed from the shelter house westerly along the southerly right of way line of the New York Central Railroad, and north thereof until it connects with the present walk now in existence just west of the water tank; that this cinder path be properly constructed by rolling or tamping into place; sufficient space should be left between the south side of the shelter house and the southerly right of way line of the New York Central in order that the cinder path may be constructed between them, thereby affording access to the stairway without passing through or around the shelter house.

In the Matter of the Application of the SCHENECTADY ILLUMINATING COMPANY for Permission to Issue \$2,447,200 of Capital Stock Pursuant to the Provisions of Section 69 of the Public Service Commissions Law

Case No. 2691

(Public Service Commission, Second District, October 10, 1916)

Order superseding previous order granting permission to a general electric company of Schenectady as to issue of \$2,000,000.

The petitioner herein, the Schenectady Illuminating Company, was authorized to issue \$2,886,700 par value of its common capital stock, and to issue the proceeds for purposes herein specified. The present application is made for permission to make an issue of 5 per cent forty-year debenture bonds, and asks that the order of May 27, 1916, be amended so as to authorize, instead of \$886,700 par value of common capital stock, sufficient bonds when sold at 90 per cent of their face value will give net proceeds of that amount. Petition granted.

By THE COMMISSION.—By orders herein dated May 13, 1913, and April 27, 1916, the Schenectady Illuminating Company was authorized to issue \$2,886,700 par value of its common capital stock and to use the proceeds realized from the sale thereof at par for certain specified purposes as enumerated in said orders.

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According to report verified the 5th day of May, 1914, \$2,000,000 of the stock so authorized has been sold, but the balance of \$886,700 has not yet been issued.

By petition dated June 12, 1916, the company states that it has been found desirable in financing its property and business to make an issue of 5 per cent forty-year debenture bonds and prays that the aforesaid order of April 27, 1916, be amended to authorize instead of \$886,700 par value of common capital stock, sufficient bonds which when sold at 90 per cent of their face value will give net proceeds of that amount. Now therefore, upon the foregoing record, ordered as follows:

1. That this order supersedes the order of the Commission heretofore entered herein on the 27th day of April, 1916.

2. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated November 22, 1915, which on the same date was sent to the corporation, such entries being listed in appendix D, pages 22 to 28 inclusive thereof, as modified in accordance with a memorandum of the division of capitalization, dated March 28, 1916, shall be entered upon the books of the Schenectady Illuminating Company, and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entries have been made.

3. That the company's plan for amortizing the amount of \$1,462,113.43, which will appear on its books and be charged to "fixed capital other intangible electric capital" after the above described journal entries have been made, at the rate of \$50,000 a year until the balance in said account is reduced to \$731,056.72, is accepted and approved, and the company is hereby ordered to amortize said amount of \$1,462,113.43 at the rate of \$50,000 per year by charges to the prescribed account "other contractual deductions from income" until the balance in the said account is reduced to \$731,056.72, provided, nevertheless, that this order shall be construed only as a determination of acceptance and approval of the company's plan of amortization to the amount and for the period therein defined; and further provided that this

order is not intended and shall not be construed as a present determination by this Commission that the amount of \$1,462,113.43, which, under the determination herein, will be charged on the books of the company to "fixed capital — other intangible electric capital" is the balance of such account which should be now properly carried by the company, or as a present determination that the balance of \$731,056.72, which will remain after the company's proposed plan for amortizing one-half of said first mentioned sum shall have been consummated, shall be deemed as the balance of said account which shall thereafter be properly carried as such by said company.

4. That the Schenectady Illuminating Company is hereby authorized to issue \$985,200 face value of 5 per cent forty-year debenture bonds, provided that none of such bonds shall be issued under the authority of this order until the terms and conditions of said debentures shall have been submitted to and approved by this Commission.

5. That said bonds of the total face value of \$985,200 when issued shall be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least \$886,680.

6. That said bonds of the face value of \$985,200 so authorized or the proceeds thereof to the amount of \$886,680 shall be used solely and exclusively for the following purposes:

(a) For the discharge of bills payable outstanding at December 31, 1912, as shown on balance sheet, page 10, of final report dated November 22, 1915, of the division of capitalization, or their renewals\$2,270 000 00

Less amount paid by proceeds of \$2,000,000 common capital stock authorized by order dated May 13, 1913.....	2,000,000 00
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\$270,000 00

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(b) For the discharge of the following current liabilities outstanding at December 31, 1912, as shown on balance sheet, page 10, of final report of division of capitalization dated November 22, 1915, or their renewals: Ac-

counts payable	\$195,304 54	
Interest accrued	100,537 50	
		<u>\$295,842 04</u>

(c) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of fixed assets from August 1, 1904, to December 31, 1912, not obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation

320,896 45

\$886,738 49

Amount unprovided for \$58 49

7. That if the said bonds of a total face value of \$985,200 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$886,738.49, no portion of the proceeds of such sale in excess of the last aforesaid sum, to wit, the aggregate of items (a) to (c) inclusive of ordering clause No. 6 herein, shall be used for any purpose without the further order of this Commission.

8. That the Schenectady Illuminating Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

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- (b) To whom such bonds were sold.
- (c) What proceeds were realized from such sale.
- (d) Any other terms and conditions of such sale.
- (e) With respect to subdivision (a) to (c) inclusive of ordering clause No. 6 herein there shall be shown the amount expended in reasonable detail of the proceeds for the purposes specified therein during such period and stating to what account or accounts such expenditures have been charged.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds used in accordance with the authority contained herein, and if during any period no bonds were sold or disposed of or proceeds thereof used, the report shall set forth such fact.

9. That the fixed capital accounts of the Schenectady Illuminating Company as corrected by the journal entries which the petitioner has been herein directed to make, having been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital installed prior to December 31, 1908, and fixed capital installed since December 31, 1908, is no longer necessary, and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform system of accounts for electrical corporations covering expenditures for fixed capital installed since December 31, 1908.

10. That the uniform system of accounts for electrical corporations is hereby amended in its application to the accounts of the Schenectady Illuminating Company in so far as is necessary so that all charges on account of retirements of fixed capital shall be charged to the account "accrued amortization of capital" heretofore created and as maintained by credits to the same and charges to "operating expenses — general amortization" as provided in the uniform system of accounts applicable to said corporation.

11. That the authority contained in this order to issue bonds is upon the express condition that the petitioner accepts and agrees

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to comply in good faith with the provisions hereof, and before any bonds are issued pursuant hereto and within thirty days of the service hereof the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

12. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 2 hereof, this order shall not be effective, and particularly that no bonds shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such bonds be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 2 of this order shall have been made, reported to and approved as sufficient by this Commission.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of the bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Joint Petition of the EMPIRE GAS AND ELECTRIC COMPANY and EMPIRE COKE COMPANY under Section 69, Public Service Commissions Law, for Authority to Issue \$61,000 in Joint First and Refunding Mortgage 5 Per Cent Gold Bonds

Case No. 5594

(Public Service Commission, Second District, October 10, 1916)

Permission asked by the Empire Gas and Electric Company and Empire Coke Company to issue \$61,000 in joint first and refunding mortgage 5 per cent gold bonds.

Under a mortgage dated March 1, 1911, to secure an authorized issue of \$5,000,000 of bonds, the present petition was filed June 9, 1916, and

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the report of the division of light, heat and power was made thereon September 28, 1916, and the division of capitalization report was made on October 3, 1916. Upon the reports of these divisions the permission herein asked for is granted, with the proviso that the bonds so issued shall be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least \$54,900, and that the proceeds of the sale of said bonds shall be used for certain purposes specifically set forth in the order here made.

BY THE COMMISSION.— Ordered as follows: 1. That the Empire Gas and Electric Company is hereby authorized to issue \$61,000 face value of its 5 per cent thirty-year joint first and refunding mortgage bonds under a certain indenture, dated March 1, 1911, given to the Pennsylvania Company for Insurances on Lives and Granting Annuities, as trustee, to secure an authorized issue of a total face value of \$5,000,000.

2. That said bonds of the total face value of \$61,000 shall be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least \$54,900.

3. That said bonds of the face value of \$61,000 so authorized or the net proceeds thereof to the amount of \$54,900 shall be used solely and exclusively for the following purposes:

(a) For the purchase and installation of the following equipment:

1. One motor driven centrifugal feed pump complete in each of the Geneva and Auburn steam plants	\$3,025 00
2. One regulator complete in each substation at Lyons, Clyde, Palmyra, Newark, Seneca Falls and Waterloo, and three in Geneva.....	15,659 70
3. High tension insulators, together with pins, bolts, tie wires, etc., account of transmission line between Geneva and Waterloo.....	1,617 00
4. New crossarms, insulators and pins account of increase in voltage from 6,600 to 13,200 volts..	2,503 20
5. One 24 marble switchboard panel with switches and instruments, 150 feet of OO 3 conductor cable, choke coils, potheads, conduit, conduit bends and cable racks at Geneva plant.....	924 00

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6. Eighteen brick switch compartments, additional current transformers, iron conduit for cables, additional bus bars and cables, special high capacity switches in cells in the Auburn substation	\$2,700 00
7. Outdoor switch with foundations and ducts and outdoor arrestors with foundations and ducts at the Auburn substation	5,000 00
8. Two outdoor oil switches; one hour gap switch, six choke coils, etc., account of extension of transmission line to connect with the new plant of the Seneca Power Corporation.....	3,720 00
9. One vertical wheel to operate a 300 kilowatt generator, together with necessary switchboard and governing apparatus at Lyons plant.....	9,500 00
	<hr/>
	\$44,648 90

(b) For the purchase of equipment for periodically testing oil in connection with high tension transformers 250 00

(c) For the enlargement of office building at Seneca Falls 6,000 00

(d) For the purchase of the following transformers for the Auburn plant:

3 75 kilowatts	\$1,065 00
3 250 kilowatts	3,600 00
	<hr/>
	4,665 00
	<hr/>
	\$55,563 90
	<hr/>

Amount unprovided for..... \$663 90

in so far as the same may be applicable provided:
(1) That such bonds or the proceeds thereof shall be applied on such new construction summarized in subdivisions (a) to (d) inclusive hereof only in so far as the same is a real increase in the

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fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical and gas corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes, subject to the limitations herein contained, a sum less than an amount equal to the face value of the bonds herein authorized, no portion of the proceeds of the bonds herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

4. That if the said bonds of a total face value of \$61,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$55,563.90, no portion of the proceeds of such sale in excess of the last aforesaid sum, to wit, the aggregate item of (a) to (d) inclusive of ordering clause No. 3 hereof, shall be used for any purpose without the further order of this Commission.

5. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Empire Gas and Electric Company unless any such hypothecation or pledge shall have been expressly approved and authorized by this Commission.

6. That the Empire Gas and Electric Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What bonds have been sold or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such bonds were sold.

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(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended for each of the purposes specified herein during such period of the proceeds of the bonds herein authorized and the account or accounts under the uniform system of accounts for electrical and gas corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital.

(f) A summary of the expenditures for each of such purposes during the period covered by the report.

(g) A summary showing the expenditures during such period by the prescribed accounts.

In reporting under subdivisions (f) and (g) of this clause there shall be further shown the expenditures of the proceeds of the bonds herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said bonds shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein and if during any period no bonds were sold or disposed of or proceeds expended, the report shall set forth such fact.

7. That the company shall within thirty days from the service of his order advise this Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of this Commission the money to be procured by the issue of said bonds herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

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**In the Matter of the Complaint of the CITY OF LOCKPORT against
INTERNATIONAL RAILWAY COMPANY, as to Protection at Two
Highway Crossings**

Case No. 5619

(Public Service Commission, Second District, October 10, 1916)

The city of Lockport asks for increased protection at the grade crossing of the International railway at Hinman road highway and also at West avenue in that city.

In the case of Hinman road highway no flagman is now employed or signal sounded, and the company's cars are operated at a high rate of speed, and the approach of the cars is obscured until people upon the highway reach the railroad tracks. In the case of West avenue, the International Railway Company operates its line crossing that avenue and then crossing by an under pass the New York Central Railroad Company's tracks, and at this point the Central tracks are elevated on a fifteen-foot embankment, so that the International cars passing from the north of the embankment cannot be seen until they are directly upon the street crossing, and no flagman is employed and no danger signal given. Method for protecting the Hinman road highway crossing agreed upon and the West avenue crossing to be protected by a flagman.

BY THE COMMISSION.—The city of Lockport, through its common council, has brought this case before the Commission asking that a flagman be stationed at the grade crossing of the Hinman road highway and the International railway at Lockport, and such petition alleges, among other things, that the crossing is not now protected in any way by flagman, warning bells or other danger signal, and that said crossing is dangerous because the cars of the International are operated at a high rate of speed over the same, and that the approach of cars is obscured until people upon the highway reach the railroad tracks.

A further complaint is made in this case that the International Railway Company operates its electric railroad around the westerly side of the city of Lockport, crossing a public street known as West avenue and then crossing by an under pass the New York Central Railroad Company's tracks around the gulf to what is commonly known as "lower town" in said city; that said line is

Public Service Commission, Second District

used almost wholly for freight traffic with electric locomotives; that the New York Central railroad at the point of crossing is elevated on an embankment about fifteen feet high and that when the International cars pass from the north of the said embankment they cannot be seen until they are directly upon the street crossing; that there is no flagman maintained at the crossing and no warning bell or other danger signal to warn persons using West avenue of an approaching train.

The answer of the respondent shows that Hinman road is a country highway and that a flagman or any other crossing protection there is wholly unnecessary; as to the crossing of West avenue by the gulf line of the respondent, it is alleged that not more than three regular trains go over such crossing each way within twenty-four hours and that no flagman, gates or other crossing protection is required.

On the 16th day of September, 1916, the Commission held a hearing in this case in the city of Lockport, at which hearing Mr. Roy H. Ernst, corporation counsel, and James Watt, alderman of the city of Lockport, appeared, together with Henry P. Murphy, an interested party, all on behalf of the complainant; Mr. E. E. Franchot of the firm of Cohn, Chormann & Franchot of Niagara Falls, appeared as attorney for the respondent, together with Mr. A. S. Henry, superintendent of transportation; on said hearing considerable proof was taken as to the condition of both such crossings, and subsequently on the 30th day of September, 1916, on said Hinman crossing, a further hearing was held, at which all of said parties, together with other interested citizens, appeared, and further proceedings were had and proofs taken.

It appears satisfactorily to the Commission from all such proceedings and proofs that the Hinman road is one of the important highways leading into the city of Lockport from the southwest and is much traveled; that the crossing is not in any sense an obscure one, but the approach of cars from either direction may be observed for hundreds of feet by people in the highway at points at least two hundred feet from the crossing on either side thereof; it was suggested at the last hearing that two fruit trees with low branches on the easterly side of the railroad tracks, and in the triangle

Public Service Commission, Second District

between such tracks and the Hinman road, which are growing on the land of the Ontario Power Company, should be removed, and that the waiting station on the westerly side of the tracks should be moved to a point nearer the crossing, as well for the convenience of passengers as for a clearer view from points in the highway west of the crossing; these matters, the respondent agreed to take care of immediately, and also agreed to erect and maintain an elevated crossing sign on the easterly side of the crossing at about the same distance from said crossing as is located the crossing sign on the westerly side thereof; with these improvements it is believed that such crossing will be made reasonably free from danger to those using the highway, without requiring the installation of a bell or other warning or the placing of a flagman at said crossing.

As to the West avenue crossing, it developed on the hearing that the few trains operated by the International Railway Company over the gulf line run at a speed of about four miles an hour as they emerge from said under pass and across the street, and it was agreed by Alderman Watt at the first hearing that if the trains and cars which cross West avenue at the point mentioned should be preceded by a flagman to warn people on the street of the approach of the train, the complaint would be satisfied; whereupon the representatives of the respondent agreed to follow that practice in the future. It is, therefore,

Ordered that this case be, and the same hereby is, closed upon the records of the Commission; on condition, however, that the complaint may be renewed by any interested party upon showing to the Commission that the respondent has failed to comply with any of the conditions herein mentioned.

Public Service Commission, Second District

In the Matter of the Petition of SEELY ELECTRIC COMPANY (of Spencer) Under Section 69 of the Public Service Commissions Law for Authority to Issue \$11,300 Common Capital Stock

Case No. 5682

(Public Service Commission, Second District, October 10, 1916)

The Seely Electric Company makes application for leave to issue \$11,300 par value of its common capital stock, to be sold at a price not less than the par value thereof.

The petition herein was filed August 22, 1916, and a certified copy of certificate of incorporation and certified copy of certificate of increase of capital stock was filed September 22, 1916. The report of the division of light, heat and power was made under date of September 29, 1916. The record shows that the proceeds of the stock sought to be used is to be used for the payment of 6 per cent promissory notes now outstanding for the purchase of a boiler plant and accessories, and for new construction. Order granted with the usual restrictions.

By THE COMMISSION. Ordered as follows:

1. That the Seely Electric Company is hereby authorized to issue \$11,300 par value of its common capital stock which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$11,300.

2. That said stock of the par value of \$11,300 so authorized or the proceeds thereof to the amount of \$11,300 shall be used solely and exclusively for the following purposes:

(a) For the discharge of the following one year 6 per cent promissory notes outstanding June 30, 1916, or the renewals thereof:

1 dated April 21, 1915	\$216 35	
1 dated June 10, 1915	1,500 00	
		<u>\$1,716 35</u>

(b) For the purchase from the S. Alfred Seely Company of a boiler plant and accessories, as follows:

Public Service Commission, Second District

1 100-horse power Erie city horizontal tubular boiler; 1 60-horse power Atlas horizontal tubular boiler; feed water heater, pump and injector; brick boiler house, brick chimney and connections..... \$1,600 00

(c) For estimated cost of new construction, as follows:

1. 17 x 18 inch uniflow engine.....	\$3,800 00	
2. 125 kilowatt alternator and exciter	1,575 00	
3. 4-panel switchboard, with switches and instruments, complete	700 00	
4. Engine foundation, piping and valves	300 00	
5. Feed water heater, steam separator, traps, etc.	200 00	
6. Tile building, with roof and floor.	760 00	
7. Engineering and superintendence.	250 00	
8. Contingencies	400 00	
		7,985 00
		<u>\$11,301 35</u>
Amount unprovided for.		<u>\$1 35</u>

in so far as the same may be applicable, provided:

(1) That such stock or the proceeds thereof shall be applied on such new construction summarized in subdivisions (b) and (c) hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

Public Service Commission, Second District

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction, unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes, subject to the limitations herein contained, a sum less than an amount equal to the par value of the stock herein authorized, no portion of the proceeds of the stock herein authorized over the actual proceeds thereof so required shall be used for any purpose without the further order of this Commission.

(4) That the unit prices contained in the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be actual expenditures made as defined by the Commission's uniform system of accounts for electrical corporations.

3. That the Seely Electric Company shall for each six months' period ending December 31st and June 30th file, not more than thirty days from the end of such period, a verified report showing:

(a) What stock has been sold, exchanged, or otherwise disposed of during such period, in accordance with the authority contained herein, and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) With respect to subdivision (a) of ordering clause No. 2 herein, there shall be shown the amount expended in reasonable detail of the proceeds of the stock herein authorized and stating to what account or accounts under the uniform system of accounts for electrical corporations such expenditures have been charged.

Public Service Commission, Second District

(f) With respect to subdivisions (b) and (c) of ordering clause No. 2 herein there shall be shown:

1. In detail the amount expended during such period of the proceeds of the stock herein authorized, and the account or accounts under the uniform system of accounts for electrical corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

2. A summary of the expenditures for each of such purposes during the period covered by the report.

3. A summary showing the expenditures during such period by the prescribed accounts.

In reporting under subdivision (f) of this clause there shall be further shown the expenditures of the proceeds of the stock herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no stock was sold or disposed of or proceeds expended, the report shall set forth such fact.

4. That the company shall within thirty days from the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

Finally, it is determined and stated, that in the opinion of the Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Public Service Commission, Second District

In the Matter of the Petition of the DEPEW AND LANCASTER LIGHT, POWER AND CONDUIT COMPANY, under section 68 of the Public Service Commissions Law, for permission to construct an electric plant, including poles, wires, conduits and appurtenances for furnishing electricity for light, heat or power to the public in the town of East Hamburg, Erie county, and for approval of the exercise of rights and privileges under a franchise therefor received from the town

Case No. 5683

(Public Service Commission, Second District, October 10, 1916)

Permission asked by the Depew and Lancaster Light, Power and Conduit Company for authority to construct an electric plant in the town of East Hamburg, Erie county.

The petition herein was filed August 17, 1916, the object of the application being to secure the right of furnishing electricity for the town and the people thereof, for light, heat and power, and for permission to use a local franchise received from the town board and superintendent of highways of East Hamburg for that purpose; the construction of such plant being shown to be necessary and convenient for the public service, permission is granted with the proviso that the consent of the State Commission of Highways be secured as to placing of poles.

BY THE COMMISSION.—The petitioner, the Depew and Lancaster Light, Power and Conduit Company, filed its petition in this proceeding on the 17th day of August, 1916, for permission to construct its electrical plant, including poles, wires, cables, conduits, subways, appliances and structures, in, through, upon, under and across all of the streets, alleys, highways and public ways of the town of East Hamburg for the purpose of using, transmitting, distributing and furnishing electricity to said town of East Hamburg and the inhabitants thereof, for light, heat and power, and for approval of the exercise of a franchise to use said streets, alleys and public ways for such purpose, received from the town board and superintendent of highways of said town, and dated August 10, 1916; thereafter a notice was duly published in

Public Service Commission, Second District

accordance with the rules of this Commission for all persons knowing any reason why said petition should not be granted, to file the same with the secretary of the Commission, on or before the 14th day of September, 1916; and proof of the publication of said notice having been duly filed, and a hearing having been duly held herein by the Commission in the city of Buffalo on the 6th day of October, 1916, at which hearing Mr. Elton H. Beals, of the firm of Strebel, Corey, Tubbs & Beals, of Buffalo, appeared as attorney for the petitioner, together with Mr. Ernest Fayler, the president of said petitioner, and there were other appearances by interested parties but no objection was made to the petition herein; and certain proofs and proceedings having been thereupon taken and had whereby it satisfactorily appears that the petitioner is a domestic corporation and is desirous of extending its service and constructing and operating its electrical distribution plant from its existing lines to and through the streets, alleys, highways and public ways of the town of East Hamburg, in accordance with the said franchise therefor received from the authorities of said town, and to construct, maintain and operate all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances as may be necessary to use, distribute and furnish electricity for light, heat and power to said town of East Hamburg and the inhabitants thereof; and the said franchise having been presented to and filed with the Commission at said hearing;

And from all of said papers, proofs and proceedings, it being hereby determined that the construction of said electrical plant, and the exercise of said franchise therefor are necessary and convenient for the public service.

It is therefore ordered:

1. That permission and approval are hereby given to the Depew and Lancaster Light, Power and Conduit Company to construct, maintain and operate the said electrical plant and all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances in, through, upon, under and across all of the streets, highways, alleys and public ways in the said town of East Hamburg for the purpose of using, distributing, transmitting and furnishing electricity for light, heat and power to the said town of

Public Service Commission, Second District

East Hamburg and the inhabitants thereof, as specifically provided in said franchise.

2. That permission and approval are hereby given to the said the Depew and Lancaster Light, Power and Conduit Company to exercise all the rights and privileges conferred by the said franchise so granted by the said town board and highway superintendent of the town of East Hamburg on the 10th day of August, 1916, subject to and in accordance with all the terms, conditions, limitations and restrictions of said franchise.

3. No poles, wires, cables, conduits, subways, appliances, structures or appurtenances herein authorized shall be placed over or across any State or county highway without first obtaining the consent of the State Commission of Highways.

In the Matter of the Petition of the DEPEW AND LANCASTER LIGHT, POWER AND CONDUIT COMPANY, under section 68 of the Public Service Commissions Law, for permission to construct an electric plant, including poles, wires, conduits and appurtenances for furnishing and transmitting electricity for light, heat or power to the public in the town of Clarence, Erie county, and for approval of the exercise of rights and privileges under a franchise therefor received from the town

Case No. 5684

(Public Service Commission, Second District, October 10, 1916)

Permission asked by the Depew and Lancaster Light, Power and Conduit Company for authority to construct an electric plant in the town of Clarence, Erie county.

The petition herein was filed August 17, 1916, the object of the application being to secure the right of furnishing electricity for the town and the people thereof, for light, heat and power, and for permission to use a local franchise received from the town board and superintendent of highways of Clarence for that purpose. The construction of such plant being shown to be necessary and convenient for the public service, permission is granted with the proviso that the consent of the State Commission of Highways be secured as to placing of poles.

Public Service Commission, Second District

BY THE COMMISSION.—The petitioner, the Depew and Lancaster Light, Power and Conduit Company, filed its petition in this proceeding on the 17th day of August, 1916, for permission to construct its electrical plant, including poles, wires, cables, conduits, subways, appliances and structures, in, through, upon, under and across all of the streets, alleys, highways and public ways of the town of Clarence for the purpose of using, transmitting, distributing and furnishing electricity to said town of Clarence and the inhabitants thereof, for light, heat and power, and for approval of the exercise of a franchise to use said streets, alleys and public ways for such purpose, received from the town board and superintendent of highways of said town, and dated July 22, 1916; thereafter a notice was duly published in accordance with the rules of this Commission for all persons knowing any reason why said petition should not be granted, to file the same with the secretary of the Commission, on or before the 16th day of September, 1916; and proof of the publication of said notice having been duly filed, and a hearing having been duly held herein by the Commission in the city of Buffalo on the 6th day of October, 1916, at which hearing Mr. Elton H. Beals, of the firm of Strebel, Corey, Tubbs & Beals, of Buffalo, appeared as attorney for the petitioner, together with Mr. Ernest Fayler, the president of said petitioner, and there were other appearances by interested parties, including Mr. Theodore Krehbiel, the supervisor of the town of Clarence, but no objection was made to the petition herein; and certain proofs and proceedings having been thereupon taken and had whereby it satisfactorily appears that the petitioner is a domestic corporation and is desirous of extending its service and constructing and operating its electrical distribution plant from its existing lines to and through the streets, alleys, highways and public ways of the town of Clarence, in accordance with the said franchise therefor received from the authorities of said town, and to construct, maintain and operate all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances as may be necessary to use, distribute and furnish electricity for light, heat and power to the said town of Clarence and the

Public Service Commission, Second District

inhabitants thereof; and the said franchise having been presented to and filed with the Commission at said hearing;

And from all of said papers, proofs and proceedings, it being hereby determined that the construction of said electrical plant, and the exercise of said franchise therefor are necessary and convenient for the public service.

It is therefore ordered:

1. That permission and approval are hereby given to the Depew and Lancaster Light, Power and Conduit Company to construct, maintain and operate the said electrical plant and all necessary poles, wires, cables, conduits, subways, appliances, structures and appurtenances in, through, upon, under and across all of the streets, highways, alleys and public ways in the said town of Clarence for the purpose of using, distributing, transmitting and furnishing electricity for light, heat and power to the said town of Clarence and the inhabitants thereof, as specifically provided in said franchise.

2. That permission and approval are hereby given to the said the Depew and Lancaster Light, Power and Conduit Company to exercise all the rights and privileges conferred by the said franchise so granted by the said town board and highway superintendent of the town of Clarence on the 22d day of July, 1916, subject to and in accordance with all the terms, conditions, limitations and restrictions of said franchise.

3. No poles, wires, cables, conduits, subways, appliances, structures or appurtenances herein authorized shall be placed over or across any State or county highway without first obtaining the consent of the State Commission of Highways.

Public Service Commission, Second District

In the Matter of the Petition of WAYNE TELEPHONE COMPANY,
under Section 101 of the Public Service Commissions Law, for
Authority to Issue \$300,000 in Common Capital Stock

Case No. 4419

(Public Service Commission, Second District, October 10, 1916)

The Wayne Telephone Company seeks permission to issue \$300,000 common capital stock for purposes specifically set forth in its petition.

The petition herein was filed July 20, 1914, and on August sixth of that year a statement containing the details of expenditures for plant additions from July 19, 1910, to March 31, 1914, was duly filed. The division of capitalization reported on the application July 6, 1915, the telephone engineer on November 6, 1915, and the final report of the division of capitalization was made December 15, 1915. A supplemental report of the telephone engineer was made under date of May 9, 1916, and a supplement to the final report of the capitalization division was made June 30, 1916. Upon this record and the recommendations made, the petitioner, Wayne Telephone Company, is authorized to issue \$300,000 par value of its common capital stock, to be sold at a price not less than par, so as to give proceeds of at least \$300,000.

BY THE COMMISSION.— Ordered as follows:

1. That the proposed journal entries contained in the final report of the division of capitalization in this proceeding, dated December 15, 1915, as amended by supplement thereto dated June 30, 1916, which on December 15, 1915, and July 11, 1916, respectively, were sent to the corporation, such entries being numbered 1, 2, 4 and 6 of the former, and 3 and 5 of the latter, shall be entered upon the books of the Wayne Telephone Company and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entries have been made.

2. That the Wayne Telephone Company is hereby authorized to issue \$300,000 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$300,000.

Public Service Commission, Second District

3. That said stock of the par value of \$300,000 so authorized or the proceeds thereof to the amount of \$300,000 shall be used solely and exclusively for the following purposes:

(a) For the discharge of the following obligations or their renewals:	
Two demand notes incurred on or about December 18, 1912.....	\$175,000 00
Thirteen other notes incurred at various times from May 26, 1911, to October 28, 1913.....	73,000 00
(b) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of fixed assets from June 2, 1910, to December 31, 1914, not obtained from the issue of stock, bonds, notes or other evidence of indebtedness of such corporation.	19,578 25
(c) For working capital.....	32,421 75
	<hr/>
	\$300,000 00
	<hr/>

provided that of such sum \$15,000 shall be used by the company to discharge its remaining bills owing to system corporations at December 31, 1914, totaling that amount in so far as the same may be applicable, provided that such net working capital shall not be disbursed by such company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

4. That the Wayne Telephone Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What stock has been sold, exchanged or otherwise disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such stock was sold.

Public Service Commission, Second District

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) With respect to the discharge of indebtedness, in detail the amount expended for subdivisions (a) and (c) of ordering clause No. 3 hereof during such period of the proceeds of the stock herein authorized, and the account or accounts under the uniform system of accounts for telephone corporations to which the expenditures for such purposes have been charged.

(f) The amount of proceeds used for subdivisions (b) and (c) of ordering clause No. 3 hereof during such period.

Such reports shall continue to be filed until all of said stock shall have been sold or disposed of and the proceeds expended or used in accordance with the authority contained herein and if during any period no stock was sold or disposed of or proceeds expended or used, the report shall set forth such fact.

5. That the fixed capital accounts of the Wayne Telephone Company as corrected by the journal entries which have been made by the petitioner herein as aforesaid, having been carefully checked, and being as nearly as may be ascertained a true statement of the same, the separation of such accounts between fixed capital installed prior to January 1, 1912, and fixed capital installed since December 31, 1911, is no longer necessary, and the petitioner herein shall debit and credit all entries in connection with fixed capital to the appropriate fixed capital accounts prescribed in the uniform system of account for telephone corporations covering expenditures for fixed capital installed since December 31, 1911.

6. That the uniform system of accounts for telephone corporations is hereby amended in its application to the accounts of the Wayne Telephone Company in so far as is necessary, so that all charges on account of retirements of fixed capital shall be charged to the account "reserve for accrued depreciation" heretofore created and as maintained by credits to the same and charges to "operating expenses — depreciation of plant and equipment" as provided in the uniform system of accounts applicable to said corporation.

Public Service Commission, Second District

7. That the amount herein authorized to be debited to the account "depreciation suspense to be amortized" shall be amortized by credits thereto and charges to the account "other contractual deductions from income" at the rate of \$4,000 per annum until the entire amount so charged shall have been amortized; provided, however, that the said company is hereby authorized to amortize the said sum more rapidly than herein provided if it so desires by crediting the account "depreciation suspense to be amortized" and debiting the account "corporate surplus" with the excess so credited over the amount required as specified herein.

8. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no stock shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such stock be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

9. That the authority contained in this order to issue stock is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any stock is issued pursuant hereto and within thirty days from the service hereof the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said stock herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Public Service Commission, Second District

In the Matter of the Petition of the SCHENECTADY ILLUMINATING COMPANY, under Section 69, Public Service Commissions Law, for Authority to Make a Mortgage or Other Agreement, to Issue Bonds; to Issue Common Capital Stock

Case No. 5604

(Public Service Commission, Second District, October 10, 1916)

The Schenectady Illuminating Company seeks permission to issue certain bonds and certain shares of common capital stock for purposes specifically set forth.

The original petition was filed June 13, 1916, details of the fixed capital expenditures chargeable to fixed capital during the calendar years 1913 to 1915, inclusive, were filed June 13, 1916, and an amendatory petition was filed herein July 2, 1916. The division of capitalization made report thereon July 17, 1916, and the report of the electrical engineer was made July 21, 1916. A second amendatory petition was filed September 6, 1916, and a supplement to the final report of the division of capitalization was made under date of September 18, 1916. Upon this record and the recommendations made in the reports mentioned, the illuminating company is authorized to issue \$1,264,800 face value of its 5 per cent forty-year debenture bonds, and also to issue \$702,200 par value of its common capital stock, to be sold at not less than par.

By THE COMMISSION.— Ordered as follows:

1. That the proposed journal entry contained in the final report of the division of capitalization in this proceeding, dated August 10, 1916, which on the same day was sent to the corporation, such entry being shown on page 9 thereof, shall be entered upon the books of the Schenectady Illuminating Company, and that within thirty days from the service of this order verified proof shall be submitted to this Commission that such entry has been made.

2. That the Schenectady Illuminating Company is hereby authorized to issue \$1,264,800 face value of its 5 per cent forty-year debenture bonds provided that none of such bonds shall be issued under the authority of this order until the terms and conditions of said debentures shall have been submitted to and approved by this Commission.

Public Service Commission, Second District

3. That the Schenectady Illuminating Company is hereby authorized to issue \$702,200 par value of its common capital stock, which shall be sold at a price not less than the par value thereof to give net proceeds of at least..... \$702,200 00

4. That said bonds of the total face value of \$1,264,800 when issued shall be sold for not less than 90 per cent of their face value and accrued interest to give net proceeds of at least..... 1,138,320 00

5. That said securities of the face and par value of \$1,967,000 so authorized or the proceeds thereof to the amount of..... \$1,840,520 00 shall be used solely and exclusively for the following purposes:

(a) For the discharge of obligations outstanding at December 31, 1915, or the renewals thereof as follows:

1. Bills and accounts owing to system corporations	\$236,813 45
2. Other bills payable.....	1,133,750 00
3. Interest accrued	3,574 09
	<hr/>
	\$1,374,137 54

(b) For the reimbursement of the treasury of the petitioner for moneys actually expended from income for the acquisition of fixed assets during the calendar years 1913 to 1915, inclusive, not obtained from the issue of stocks, bonds, notes or other evidences of indebtedness of such corporation. 316,745 78

(c) For working capital..... 150,000 00

1,840,883 32

Amount unprovided for..... \$363 32

Public Service Commission, Second District

in so far as the same may be applicable provided that such working capital shall not be disbursed by such company for purposes properly chargeable to income, but shall be retained to enable the company to carry its accounts receivable and to provide a sufficient amount of materials and supplies to economically transact its business.

6. That if the said securities of a total face and par value of \$1,967,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$1,840,883.32, no portion of the proceeds of such sale in excess of the last aforesaid sum, to wit, the aggregate of items (a) to (c), inclusive, of ordering clause No. 5 hereof, shall be used for any purpose without the further order of this Commission.

7. That none of the said bonds herein authorized shall be hypothecated or pledged as collateral by the Schenectady Illuminating Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

8. That the Schenectady Illuminating Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold or disposed of during such period in accordance with the authority contained herein and the date of such sale or disposition.

(b) To whom such securities were sold.

(c) What proceeds were realized from such sale.

(d) Any other terms and conditions of such sale.

(e) In detail the amount expended during such period of the proceeds of the securities herein authorized for subdivision (a) of ordering clause No. 5 hereof, and the account or accounts under the uniform system of accounts for electrical corporations to which the expenditures for such purpose have been charged.

(f) The amount used during such period of the proceeds of the securities herein authorized for subdivisions (b) and (c) of ordering clause No. 5 hereof.

Such reports shall continue to be filed until all of said securi-

Public Service Commission, Second District

ties shall have been sold or disposed of and the proceeds expended and used in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended and used, the report shall set forth such fact.

9. That the Schenectady Illuminating Company is hereby authorized to sell the 7,022 shares, each of the par value of \$100, aggregating a total par value of \$702,200, of common capital stock herein authorized to be issued, to the General Electric Company, and the General Electric Company is hereby authorized to acquire and hold such stock of the Schenectady Illuminating Company so authorized.

10. It is nevertheless expressly provided that in all respects other than as directed in ordering clause No. 1 hereof, this order shall not be effective, and particularly that no securities shall be issued or sold hereunder by the applicant, nor shall the issue or sale of any such securities be deemed to have been approved and authorized by this Commission unless and until compliance with the requirements of ordering clause No. 1 of this order shall have been made, reported to and approved as sufficient by this Commission.

11. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof, and before any securities are issued pursuant hereto and within thirty days of the service hereof the said company shall file with this Commission a satisfactory verified stipulation duly authorized by its board of directors, accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of this Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Public Service Commission, Second District

In the Matter of the Petition of the GENERAL ELECTRIC COMPANY, under Section 70, Public Service Commissions Law, for Consent to Acquire SCHENECTADY ILLUMINATING COMPANY Stock

Case No. 5662

(Public Service Commission, Second District, October 10, 1916)

The General Electric Company seeks permission to acquire any stock of the Schenectady Illuminating Company, which may be authorized.

The petitioner is the owner of 20,791 shares of the par value of \$100 each, an aggregate of \$2,791,100 of the common capital stock of the Schenectady Illuminating Company, thus lacking only nine shares of the outstanding common capital stock of that corporation, which shares stand in the name of nine directors of the Schenectady Illuminating Company. The petitioner asks permission to acquire any stock of the illuminating company which that corporation may be authorized to issue under pending applications in cases Nos. 2691 and 5604, now before the Commission. Under date of April 27, 1916, certain authority was granted to the illuminating company, but by an order of even date herewith such order was superseded by authorization for \$985,200 face value of 5 per cent forty-year debenture bonds, to be sold at not less than 90 per cent of face value and accrued interest. Authority given the General Electric Company to acquire the 7,022 shares aggregating \$702,200 par value of the common capital stock of the illuminating company, which that company is authorized to issue by the order of even date herewith in case No. 5604.

BY THE COMMISSION. The General Electric Company in its petition in this proceeding states that it is the owner of 20,791 shares, each of the par value of \$100, aggregating a par value of \$2,079,100, of the common capital stock of the Schenectady Illuminating Company — or nine shares less than the total outstanding common stock of that corporation which nine shares stand in the name of nine directors of the Schenectady Illuminating Company. It asks for permission to acquire any stock of the illuminating Company which that corporation may be authorized to issue as a result of its application now before the Commission in Cases Nos. 2691 and 5604.

Under date of April 27, 1916 (Case No. 2691), the Schenectady Illuminating Company was authorized to issue \$886,700 par value of its common capital stock but by order of even date here-

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with, as a result of a supplemental application, such order was superseded by an authorization for \$985,200 face value of 5 per cent forty-year debenture bonds to be sold for not less than 90 per cent of their face value and accrued interest. Since that date no additional stock has been authorized in that proceeding. By order of even date herewith in Case No. 5604, however, the illuminating company was authorized, among other things, to issue and sell at not less than its par value \$702,200 par value of common capital stock and use the proceeds realized therefrom for certain defined purposes. Now, therefore,

Ordered, That the General Electric Company is hereby authorized to acquire and hold the 7,022 shares, each of the par value of \$100, aggregating a par value of \$702,200, of the common capital stock of the Schenectady Illuminating Company which that corporation is authorized to issue by order of even date herewith in Case No. 5604, provided that the net cost to it of such stock shall be the par value thereof.

In the Matter of the Application of NIAGARA RIVER AND EASTERN RAILROAD COMPANY, INC., for a Certificate of Public Convenience and Necessity under Section 9 of the Railroad Law; and for Permission and Approval to Exercise Its Franchises and for Leave to Commence Construction under Section 53 of the Public Service Commissions Law; and for a Determination as to the Method of Crossing Streets, Avenues, Highways and Roads in Accordance with the Provisions of Section 89 of the Railroad Law

Case No. 4555

(Public Service Commission, Second District, October 11, 1916)

An application for a certificate of public convenience and necessity for the building of a railroad will not be granted where it would result in dividing the proposed route of the railroad.

Limitation upon authority of the Commission to grant the certificate in such a case.

Burden of proof is on applicant to show public convenience and necessity in order to authorize the granting of such permission.

Section 9 of the Railroad Law provides, among other things, that no railroad corporation formed after May 18, 1892, shall begin the construc-

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tion of its road until the Public Service Commission shall certify that public convenience and a necessity require the construction of the railroad as proposed in the certificate of incorporation of such railroad corporation.

The Niagara River and Eastern Railroad Company, Inc., was duly incorporated on or about October 1, 1914, and shortly thereafter made application to the Public Service Commission for the certificate of public convenience and a necessity as provided by section 9 of the Railroad Law; the proposed route of the applicant's certificate of incorporation as running from a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way, in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, N. Y., to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, N. Y., which places will be its termini, and the length of said road will be twenty miles.

The proof in the case shows that the applicant relies for a large part of its business upon a connection to be made with a Canadian trans-continental railroad which is planned to be brought across the Niagara Gorge by a bridge to be constructed by the Ontario-Niagara Connecting Bridge Company. It is claimed, also, that by forming a connecting link between the Buffalo, Lockport and Rochester road, around the easterly and southerly sides of the city of Lockport, and the tracks of the International railway at Hinman, which would be about four miles of the easterly end of the proposed route, a large freight traffic would be accommodated, and a necessary outlet for the Buffalo, Lockport and Rochester provided; these claims seem to be well supported by the evidence in this case. It is not seriously contended that the sixteen miles of rural territory between Hinman and the Niagara river requires the building and operation of this railroad because the proposed route parallels the New York Central railroad for almost the entire distance. The bridge is not yet constructed nor even commenced, and the Canadian railroad is no nearer the Gorge than eighty miles, with no prospect for its extension in the immediate future. Under these circumstances, the Commission has been asked to grant a certificate of public convenience and a necessity herein under section 9 of the Railroad Law, so that the construction of the railroad can be made for the four miles around Lockport to Hinman, but to hold for future consideration the route westerly from Hinman, until such time as the Canadian railroad shall be brought to the Niagara river, and the bridge project ready to be carried out. This is, in effect, a request that the Commission divide the proposed route of the railroad, and grant a certificate for a part only of such route. *Held*, that the Commission is without legal authority to divide the route proposed by the applicant, and grant a certificate of public convenience and a necessity for any part of such route, or to grant such certificate conditioned upon the happening of any future event. Also *Held*, that the applicant has failed to show that public convenience and a necessity require the construction of a railroad as proposed in its certificate of incorporation. Application denied.

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Dudley & Gray, attorneys for the petitioner.

Charles Hickey, president of the petitioner.

Ramsdale & Church, attorneys for the Ontario-Niagara Connecting Bridge company.

William Nottingham, attorney for Buffalo, Lockport and Rochester Railway Company.

Fred D. Corey, president of the Niagara, Lockport and Ontario Power Company.

George A. Brock, Mayor of the City of Lockport.

William Laughlin, Mayor of the City of Niagara Falls.

M. A. Federspiel, attorney for property owners in Lockport.

William W. Storrs, attorney for property owners in Lockport.

Charles E. Dickinson, industrial agent for the City of Lockport.

W. Harrison Upson, William A. Williams, George T. Lennon, and William A. Dickinson, officers of the Lockport Board of Trade.

John R. Earl, Joseph Turner, John Mann, and E. H. Babbitts, officers of the Lockport Chamber of Commerce.

William E. Lochner, attorney for property owners in Lockport.

Abner T. Hopkins, attorney for property owners in Lockport.

E. J. Emmert, chairman Board of Supervisors, Niagara county.

Roy H. Ernest, attorney for property owners in Lockport.

F. S. Johnson and F. R. Sanborn, committee representing Village of Sanborn.

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E. S. Moore and Jesse Peterson, property owners in Lockport.

Hoyt & Spratt, attorneys for the New York Central Railroad Company, opposed to application.

HODSON, Commissioner.— The case involves the application of the Niagara River and Eastern Railroad Company, Inc., under section 9 of the Railroad Law, for a certificate of the Commission that all the conditions of said section have been complied with, and that public convenience and a necessity require the construction of the railroad as proposed in the applicant's certificate of incorporation; under section 89 of the Railroad Law for a determination as to the method of crossing the streets, avenues, highways and roads proposed to be crossed by said railroad; and under section 53 of the Public Service Commissions Law for permission to begin construction of said railroad and exercise the franchises therefor.

The route of the proposed railroad, as shown by such certificate of incorporation, begins at "a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, New York, and runs to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, New York, which places will be its termini, and the length of said road will be twenty miles." This statement complies with the statute as to the route of the proposed railroad, its length and termini; and it may be stated here that the applicant has duly complied with all the requirements of section 9 of the Railroad Law, concerning the publication of its certificate of incorporation, and the proof thereof, which has been filed with the Commission, is satisfactory.

The proposed route of such railroad as above set forth, gives only the general direction from one terminus to the other, but the petition in this case discloses the specific plans of the company, and shows the particular territory intended to be traversed. It appears from such petition that the route will begin at a point in the city of Lockport, on the east and west right of way of the Buffalo, Lockport and Rochester Railway Company, at or near the

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intersection of such right of way with the north and south highway known as Lover's Lane, and extending in a southerly direction along said highway to a point at or near where Mulberry street would intersect said highway, if extended; thence in a southwesterly direction across High street and Akron street, intersecting said streets at a point east of Hickory street; thence in a southwesterly direction to Lincoln street; thence westerly on Lincoln street and Summit street to and across the Erie and Barge canals; thence in a southwesterly direction to a point on the right of way of the Niagara, Lockport and Ontario Power Company, at or near the intersection of said last named right of way with the Buffalo and Lockport Railway Company; thence in a westerly direction along said right of way of the Niagara, Lockport and Ontario Power Company to the easterly bank of the Niagara river. This was further amplified by the proof in the case, and the record clearly shows that the proposed railroad is to be constructed from a connection with the Buffalo, Lockport and Rochester railway in the easterly part of the city of Lockport, thence going a distance of about four miles around the southeastern part of the city to Hinman, which is located on the westerly side of Lockport; from Hinman it will continue in a westerly direction through the towns of Lockport, Cambria, Wheatfield, and Lewiston, to a point about 400 feet from the east bank of the Niagara Gorge, at or near the Devil's Hole, so called, where the Ontario-Niagara Connecting Bridge Company contemplates the construction of a railroad bridge across the Gorge, thus connecting the United States and the Dominion of Canada. Further details of the applicant's plans include the changing of the route around the city of Lockport so as to avoid the occupation of public streets, except at crossings. There would be several of such crossings, seven of which are located on the route between the easterly terminus of the road and Hinman, and all of them at grade, and one of these is known as the Transit Road, which is one of the important state highways in Western New York, leading into the city of Lockport from the territory around Buffalo. For the remainder of the route, consisting of about sixteen miles, there are upward of ten other highway crossings, all of which will be at grade except two which will be over-

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head, and the railroad is planned to be taken across the boulevard between Niagara Falls and Lewiston by an under-pass. The railroad is to be carried over the Barge canal by a bridge about 215 feet long; this canal crossing will be about half a mile south of the city of Lockport and east of Hinman. There will be two overhead crossings of the Lockport branch and the Niagara Falls branch of the New York Central railroad between Hinman and the Gorge, with a clearance of 25 feet in each case, and the crossing of the electric railroad of the International at Hinman will be at grade, and a connection made with said railroad at that place for the interchange of passengers and freight. At the river bank are located the Rome, Watertown and Ogdensburg and the Lewiston branches of the New York Central railroad and the Gorge trolley line; the first of said roads is on the top of the bank, the Lewiston branch is about half way down, and the Gorge road runs along the river. The easterly bridge approach is to be located by the Secretary of War, and when so located, will under-cross the Rome, Watertown and Ogdensburg railroad and conveniently cross over the other two roads. The applicant intends to then make its westerly terminus coincide with the easterly terminus of the tracks on the bridge, and make connection therewith; and such bridge railroad will also have convenient connections at its Canadian approach with one of the trunk line railroads of the Dominion, known as the Canadian Northern, which, it is claimed, has planned to extend its road from its present easterly terminus at Toronto to the Niagara escarpment there connecting with the Ontario and Niagara Connecting Bridge, and thus meeting the plans of the applicant to establish a through line from the Canadian northwest to and through Niagara Falls and Lockport, and on to points along the Buffalo, Lockport and Rochester railway and through the State of New York to the Atlantic seaboard, which would be of great value and importance in the transportation of freight. The right of way for the railroad of the applicant between Hinman and the river is 50 feet wide, and has already been contracted for with the Niagara, Lockport and Ontario Power Company, whose land is 300 feet wide.

The topography of the land between these points is such that

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there would be little necessity for cutting and filling, except at the overhead crossings, and there are no large streams to cross.

There is but one steam railroad operating between Lockport and Niagara Falls, and that is known as the Niagara Falls branch of the New York Central railroad, and occupies substantially the same territory as the road of the applicant would serve; this line continues from Lockport to Rochester through many of the same towns and villages which are traversed by the electric line of the Buffalo, Lockport and Rochester Railway Company, although, at certain points, the two roads are a considerable distance apart.

The passenger cars of the Buffalo, Lockport and Rochester Railway Company run through the city of Lockport, and then go over the International railway to the city of Buffalo. The International Railway Company operates the Lockport branch of the Erie railroad between Buffalo and Lockport, and at North Tonawanda this line crosses and is connected with the International railway, running from Buffalo to Niagara Falls.

The Rome, Watertown and Ogdensburg branch of the New York Central railroad runs north from Niagara Falls to and along the southern shore of Lake Ontario, about eight miles north of the Falls branch. The Buffalo, Lockport and Rochester railway is not a steam railroad; neither is it a street surface railroad as defined by the Railroad Law; but it is a railroad, and has been operated as such for many years, its motive power being electricity. It runs from the city of Lockport to a point about two and a half miles from the city of Rochester, a distance of more than fifty miles, through the great fruit belt of New York state, in the counties of Niagara, Orleans, and Monroe. Its corporate name implies that the road connects Buffalo with Rochester, but it does nothing of the kind. It does not enter either city. Why the road was not originally built so that its route would be coincident with its name has not been explained. Perhaps the reason is found in the fact that at both termini it has convenient trolley connections for the transportation of passengers to both cities; while at the Rochester end there is also a connection with the steam railroad of the Buffalo, Rochester and Pittsburgh Railway Company, and at Lockport it has like facilities furnished by the International

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railway in its relations with the Erie railroad, and in some measure, it may be said, interchange facilities for both passengers and freight are thus afforded.

It is true that the road has not made any great effort to secure the freight business in the territory contiguous to its line, largely because such business has been centered in the various villages which have been conveniently served by the New York Central railroad. But of late years the fruit growing and shipping interests in that vicinity have developed to such an extent that now there are demands at almost every point along the railroad to furnish facilities for the prompt shipment of such fruits and other products to the market; and this demand is increasing every year. Auto trucks are used in great number during the shipping season, but they are employed almost entirely for short hauls to nearby markets.

Under these circumstances, the Buffalo, Lockport and Rochester Railway Company has wisely determined that there can be no better way to supply those connections and facilities which will be adequate for its present and prospective needs than to do what it should have done in the first instance, and extend its road to both Buffalo and Rochester; or, failing in that, to lend its aid to such projects as will give the same benefits and privileges. That is just what has been done in this case, and also in Case No. 5053, which involves the petition of the Rochester Connecting Railroad Corporation for a certificate of public convenience and a necessity and for permission to construct a railroad which will connect the city of Rochester with the easterly terminus of the Buffalo, Lockport and Rochester railway. In both these cases, the last named company and many of its large stockholders and bondholders are earnestly supporting the claims of the petitioner, and they are also directly interested in the petitioner as stockholders and promoters. Indeed, there can be little doubt but that, although the ostensible purpose in these cases is to construct and operate independent lines of railroad, the main object is to supply an outlet at both ends of the Buffalo, Lockport and Rochester railway, so that such railway may be connected with the outside world; and if the petitioner in this case had sought only for authority to build to Hinman,

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which would afford direct connections with the International railway and Erie railroad, it is certain that the problem involved herein would be very much simplified. But the applicant does not stop here. The four miles of railroad between the westerly terminus of the Buffalo, Lockport and Rochester railway and Hinman is only a small part of the route of the proposed line, which would continue from Hinman in a westerly direction for sixteen miles to the Niagara Gorge, passing through parts of the towns of Lockport, Cambria, Wheatfield, and Lewiston, and the hamlets of Cambria and Sanborn. This stretch of sixteen miles is all rural territory and, excepting the two villages mentioned, each having about 400 residents, there are very few inhabitants along the proposed railroad. The village of Pekin is near Sanborn, but away from this line, and also has a few hundred inhabitants. The proposed railroad would parallel the Niagara Falls branch of the New York Central railroad the entire distance from Lockport to Niagara Falls except between Sanborn and the Niagara river where it would occupy a territory not now served by any railroad, a distance of about two miles. The point reached at the Niagara river by the proposed line is about two miles away from the north end of the city of Niagara Falls, where the present suspension bridges are located, and this part of the city is known as the railroad section, which is two miles or more from that portion of the city formerly designated as the village of Niagara Falls, and that locality contains the greater number of inhabitants, all the important hotels, and a majority of the manufacturing and industrial plants of the city, and here, also, are the world famed Niagara Falls. The westerly terminus of the proposed road would be a considerable distance north of the Niagara Junction railroad and the electric lines leading into the city of Niagara Falls, and no definite provision is made for connection with either road, although it is planned to reach one or the other in some convenient way so as to give passenger and freight service into the city proper.

So far as passenger traffic is concerned, the Buffalo, Lockport and Rochester Railway Company now has such established facilities that through passengers may travel between Buffalo and Rochester without change of cars, and like accommodations are

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afforded between Rochester and Niagara Falls, except that a change must be made at either Lockport or North Tonawanda to the International, and even this inconvenience could be obviated by a trackage arrangement between the two companies, the same as exists for the Buffalo-Rochester trip. The further point is made that the new line would reduce the distance between Lockport and Niagara Falls about four miles. This is true so far as the north end of Niagara Falls is concerned; but for passengers desiring to be landed in that part of the city where the Falls are located and where the hotels may be conveniently reached, the present trolley accommodations are superior to those proposed by the applicant, and the difference in the time of travel is trifling.

The incorporators of the Niagara River and Eastern Railroad Company have paid in \$20,000 as their first subscription to stock, but no further obligation has been made by them or any other persons toward the \$1,500,000 necessary for the building of the road. This last amount is the estimate of the applicant's engineer for the cost of the road, exclusive of stations, rights of way, cars and equipment. These figures have been challenged by the engineer for the contestant, the New York Central Railroad Company, and one of the applicant's witnesses gave his estimate at nearly \$2,000,000.

A witness called by the contestant agreed substantially with the applicant's estimates as to the cost of constructing the road, but added that the cost of locomotives, cars, stations, sidings, connections with the International and Niagara Junction railroads, would increase the sum to over \$2,000,000; and further testified that to build the road without any grade crossings along the line would swell the expenditure to \$4,609,440.

Indeed, if reliance should be had upon the estimates presented by the contestant, the mere building of the railroad would be far in excess of the figures given by the applicant, and the necessary re-location, detours, and switch connections along the line of the Buffalo, Lockport and Rochester railway would entail an expense which would be a heavy burden upon that company. As to financing the Niagara River and Eastern Railroad Company, the record does not disclose any agreement on the part of any person to fur-

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nish the necessary moneys. The only evidence produced before the Commission on this important subject is found in the testimony of Mr. Frank A. Dudley, who presented certain letters and telegrams from three incorporators, which were claimed to be sufficient to show that those who sent them could be relied upon to furnish the necessary funds. Mr. Edward G. Connette of Buffalo, the president of the International Railway Company, stated that "when necessary consents from public authorities are obtained, I shall assist as far as possible in the financing of the proposition."

Mr. E. R. Wood of Toronto, a man of financial importance, telegraphed that "when the company secures the necessary rights and permission, I will be glad to assist in financing." Mr. Clifford D. Beebe of Syracuse, the president of a syndicate of electric railroads in Central New York, wrote that "*In re* financing of Niagara River and Eastern Railroad, our associates in connection with New York, Buffalo, and Canadian interests will be prepared to carry our share of the cost of that enterprise."

These communications, which are given *verbatim*, contain all the facts which may be claimed as a basis for any agreement, subscription, or obligation on the part of any person to assist in financing this project.

This is a bare statement of the proof in this case, as it relates to the economic questions involved, and does not reflect upon the financial ability or good faith of any of the gentlemen referred to, or of those whose names appear as incorporators of the applicant company.

The Governments of the United States and the State of New York have each indicated their approval of the bridge project by legislative enactment, proof of which was presented to the Commission during the taking of testimony, and since the close of the hearings, information has come to the Commission that the Parliament of the Dominion of Canada had also passed an enabling act for such purpose, and the same has been approved by the Governor-General. Nothing now stands in the way of erecting the bridge, and of carrying that particular project forward to completion, so that those interested in the proposed bridge may reap the reward which they claim awaits them, by promptly taking

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advantage of the authority granted by the governments on both sides of the International line. But the bridge has not been built, nor have any steps been taken in that direction save only the procurement of the governmental permits above mentioned. The bridge provided for in these legislative acts is to be for railway and general traffic, and the evidence in this case shows that it is intended to span the Niagara river at its narrowest point, at or near the Devil's Hole, so called, connecting on the west with the Canadian Northern Railway, a transcontinental Canadian line, which now extends from the Pacific coast to Toronto, and on the New York side of the river with this proposed railroad. It has been sufficiently shown that the Canadian Northern is a large freight carrying road, and its traffic, or some considerable portion thereof, destined to the Atlantic seaboard, or other points east of the Niagara frontier, might reasonably be expected to go over the proposed railroad and its affiliated lines, and the estimated amount of the same at one hundred carloads a day does not seem extravagant. But how can such a thing be done when the Canadian Northern's present easterly terminus is Toronto, about eighty miles from the Niagara Gorge, with no assurance that an extension for that distance will ever be built, or, if built, how could the applicant expect any benefit from such traffic, with no bridge across the Niagara river?

These are very pertinent questions in this matter, and answers to them bear directly upon the inquiry which the Commission is required to make as to the convenience and necessity for the railroad sought to be constructed.

Counsel for the applicant, and others who have appeared and urged affirmative action in this matter, have presented the case as combining all these features, and each one of importance to the main proposition. It has not even been suggested that the building of this line within its prescribed route between Hinman and the Niagara river is called for by any public demand, or that it would be feasible in any sense, without the expected business from the far west by way of the Canadian Northern and the bridge. And it cannot be reasonably claimed that the territory between the termini of the proposed route, standing alone, would ever fur-

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nish sufficient business to justify the construction and operation of the road, especially as most of such territory is now adequately served by the New York Central line and its connections. Under these circumstances, it satisfactorily appears that such business, both incoming and outgoing, would be very meager. But even though it should be small in amount, it would become an important consideration in this case just as the applicant claims, if it could be coupled with such business as could be carried to and through Niagara Falls, and augmented by actual traffic over the bridge from Canada. Those representing the applicant are confident in their opinions and positive in their assertions that in a short time the character of this locality would be changed by the building of this railroad, but the Commission is face to face with the bare facts as disclosed by the present political divisions and physical conditions of this sixteen miles of country. We cannot accept such conclusion, which we believe is not supported by any substantial reasons. As evidence of the correctness of this statement it is only necessary to cite the fact that the New York Central Railroad Company, which traverses this very territory, has been patiently waiting for such development for many years, and at the time the proof was taken on the hearing, that company showed that its railroad, running between Niagara Falls and Rochester, and known as the Falls branch, is a little more than seventy miles in length, comprehending the entire distance and practically the same territory covered by the Buffalo, Lockport and Rochester railway and the proposed route of the applicant herein; that it is all double tracked except about twenty miles in the neighborhood of Middleport; that it has convenient terminals at Niagara Falls, Lockport, and Rochester, and possesses adequate connections with its other branches and other railroads at all of these places, with its main line at Rochester, and both the Lockport branch and Falls branch reach the main line at Buffalo, where convenient switching and interchange facilities are had with all the important railroads running to and through New York state, from any point. Yet with all these opportunities for prompt and efficient service, it appears that there was very little difference

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in the carload traffic on the Falls branch of the New York Central Railroad Company in 1913 and 1914, it being 29,042 cars in 1913, and 28,701 in 1914 this includes both carload freight from the suspension bridges and local points; of these shipments only 279 cars were transported from one point to another within the territory covered by the Falls road; there is included in the shipments given for the two years mentioned the stone carried from the quarries at Cambria and Gasport for the Lackawanna Steel Company and the Wickwire plant, both of which quarries are reached by switches from the New York Central railroad, and both being a long distance away from any other railroad; of the 29,042 cars carried over the Falls branch in 1913, there were 4,169 routed west of Buffalo over the Lake Shore railroad which is now a part of the New York Central system; the number of cars destined for Buffalo was 8,577, and of this number 6,563 carried stone from the Cambria quarry for the Lackawanna Steel Company, and 389 for the Wickwire Steel Company from its Gasport quarry; all these stone shipments may fairly be classed as New York Central business, on account of the general situation of the quarries, the plants, and the switch connections with that railroad, and also because of the contractual relations which were shown to exist between the several companies. Taking these stone shipments of 6,952 carloads from the total number of Buffalo cars handled on the Falls branch for the year 1913, it would leave only 1,625 cars of all other kinds of freight which were transported over this branch to Buffalo; and even assuming that the applicant would be able to obtain a large percentage of this business,—or all of it,—the benefit to be derived would not be of much consequence.

Another computation of the carload traffic over this branch destined for Rochester and points east of that city is interesting; in 1913 there were 861 cars carried to Rochester and 11,918 beyond; more than 90 per cent of the latter shipments went to points reached by the New York Central lines; during the same year 490 cars were shipped west of Suspension Bridge to points in Canada, over lines having direct connection with the New

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York Central railroad. It is not deemed necessary to amplify the figures relating to the year 1914, for the reason that the traffic was about the same as for the year 1913, and the divisions as to local and through freight, its character and destination, do not differ materially from the figures for 1913.

We have thus analyzed this evidence, taking the figures direct from the record, in order to show that the construction and operation of another railroad paralleling the Falls branch of the New York Central between Lockport and Niagara Falls would not be a good business venture, for the reason that there is not sufficient business in the territory to sustain it. Indeed, it is quite apparent that without its importance and necessity as a connecting link and feeder to the main line, the Falls branch of the New York Central Railroad would not be a success as an independent proposition.

It must be borne in mind that the statistics here given concerning the business and earnings of the Falls branch of the New York Central Railroad Company include its entire seventy miles of road between Rochester and Niagara Falls, which is more than the combined length of the proposed road of the applicant and the Buffalo, Lockport and Rochester railway, because the latter does not reach within two and one-half miles of the city of Rochester; and, besides, it serves the fruit section of Niagara, Orleans, and Monroe counties, and has switches, sidings and freight shipping facilities in all the municipalities through which the Buffalo, Lockport and Rochester railway is operated, in addition to its manifold conveniences in all the cities along the line. If the New York Central Railroad Company, with all its facilities and connections with its main line and other railroads, is unable to obtain a greater amount of business than has been shown to exist in the localities selected by the applicant for its route, it is difficult to understand how the projectors of the new road can come into this field and expect to thrive. Of course, it is conceded that the fruit shipments will gradually increase and probably double within the next few years; but such an item of business would be inconsiderable when dealing with a project requiring millions of dollars of initial expenditure and a vast sum of money for fixed charges and operating expenses.

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In other words, it is believed that the business which could be obtained by the applicant in the territory between Lockport and Niagara Falls would be negligible in amount and value, and the traffic derived from the Buffalo, Lockport and Rochester railway could not be expected to be any better, in the absence of suitable facilities for shipments to and through Buffalo and Rochester, and across the Niagara river to Canadian points. And this discussion thus brings us to a plain statement of the facts that the connection of the Buffalo, Lockport and Rochester line with the International and Erie at Hinman with opportunities for shipments to and beyond Buffalo, and the traffic which would be received from Canada, with the Canadian Northern brought to the Gorge, and with the bridge in existence, and the further outlet for freight destined for Canada, together constitute the important and valuable features of the plans presented in this case, and must be treated accordingly by the Commission. During the oral argument it was intimated to counsel for the applicant that this was the view of the Commission, at least so far as the connection at Hinman was concerned; immediately the plans of the applicant were changed and considerable correspondence followed with reference to granting the certificate of necessity for only that part of the route between the westerly terminus of the Buffalo, Lockport and Rochester railway east of Lockport, and the junction with the International-Erie tracks at Hinman; and in furtherance of this, the applicant filed with the Commission, January 19, 1916, a duly executed stipulation by which it waived its right to an immediate determination of the mode of construction of said proposed railroad from Hinman westerly to the Niagara river, and consented to hold that portion of the application herein for future consideration. Thus the Commission was asked to divide the route of the proposed railroad and grant a certificate of public convenience and a necessity for only a small part of the route, consisting of about four miles around the easterly and southerly sides of the city of Lockport, so that such railroad could be constructed from the Buffalo, Lockport and Rochester railway to Hinman.

This presents a novel question, for it does not appear that it

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has ever before been considered by the Commission or passed upon by the courts. Perhaps this is not surprising in view of the very plain provisions of the law which govern the action of the Commission in cases of this kind, and which, apparently, have not required judicial construction. Section 9 of the Railroad Law provides that no railroad corporation formed in this State after May 18, 1892, shall begin the construction of its road until certain steps shall be taken with reference to the publication of its certificate of incorporation, nor until the Public Service Commission shall certify "that public convenience and a necessity require the construction of said railroad *as proposed in said certificate of incorporation.*" The proposed route of this railroad as contained in the certificate of incorporation of the applicant is hereinbefore set out as running "from a point on the line of the Buffalo, Lockport and Rochester Railway Company's right of way in the city of Lockport, near the easterly boundary of said city of Lockport, in the county of Niagara, N. Y., to the easterly bank of the Niagara river, in the town of Lewiston, Niagara county, N. Y., which places will be its termini, and the length of said road will be twenty miles." More definite language could not have been employed for the purpose of fixing the points between which this road was to be built, than is used in the first part of such description; but to make assurance doubly sure, the description then states that the termini of the road will be the two places previously mentioned, and which are the easterly boundary of the city of Lockport and the easterly bank of the Niagara river with an intervening distance of twenty miles, which is also stated in said certificate as the proposed length of the road. No other construction can be given to this language than that the applicant has thus proposed and defined the route of its railroad to run between these two points for a distance of about twenty miles, and it is equally plain that if the Commission should grant a certificate of public convenience and a necessity, it must be for such proposed route, no more, no less; and likewise if negative action should be taken, it must follow that the proposed route of the applicant should be disapproved in its entirety.

This proposition is strengthened, if need be, by a glance at

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the next succeeding section of the Railroad Law, for it is there specifically provided that upon an application to the Commission by a street surface railroad company for a certificate of public convenience and a necessity, under section 9 of the Railroad Law, the Commission is empowered to grant the certificate for a part only of the proposed route, and authorize the construction of a railroad over such part.

Obviously, if the Legislature had intended that the Commission should have this same power to divide the proposed route of a railroad, other than a street surface railroad, then section 9 of the Railroad Law would have been drafted with that end in view, and would not contain the express provision that a certificate of public convenience and a necessity should be based upon the proposed route of the railroad as laid out and defined in the certificate of incorporation. The Commission has no right to read into the law a provision which the Legislature has deliberately left out.

If this same authority which the Commission has with reference to the division of the route of a street surface railroad, had been intended as to any other railroad, there would have been unmistakable language indicating the same, and, in this respect, sections 9 and 10 of the Railroad Law would have been framed substantially alike; but as they now stand, they are totally different, and no process of reasoning can properly lead to a conclusion that the Commission has power to grant a certificate herein for the construction of a railroad over a part only of the route indicated in the applicant's certificate of incorporation.

The Commission has been very much impressed by the extended, earnest and very able arguments of counsel for the applicant, which is supported in some measure by the evidence, maintaining that the matters involved in this project are of a public character; they have had the effect, to which they were certainly entitled, of inducing great caution and very mature deliberation concerning the legal questions with which this case abounds; beyond the exercise of such caution and deliberation this Commission cannot go in support of the applicant's contention, for we are convinced that there has been no sufficient compliance with the law in showing that public convenience and a necessity require the construc-

tion and operation of a railroad over the proposed route, under the existing circumstances.

The evidence may be satisfactory to the projectors as showing an opportunity for the development of other enterprises, but it falls far short of proof of those facts which must exist before a certificate of public convenience and a necessity may properly be issued.

We have shown how important it would be to the applicant to have the Canadian Northern extended from Toronto to the Niagara Gorge, a distance of about eighty miles. But how is this to be accomplished? Probably not by the company itself, for it is well known that its road was built by government aid, and further financial assistance is expected for this construction. It is a matter of public knowledge that the Canadian Government is at present occupied with problems far more pressing and of greater importance than the extension of this railroad. Let us suppose, in this connection, that the application in this case should be granted; it cannot be possible that any of the able and far seeing projectors would favor the construction and operation of the road over its entire route, until the Canadian Northern was actually brought to the Gorge, and across a bridge, so that the Niagara and Eastern could receive benefits therefrom; and we believe this to be so because, as before stated, the proof in this case has clearly established that the traffic which might be reasonably expected to and from Canada, with the bridge and the extension of the Canadian Northern, coupled with the business to be obtained by a connection at Hinman with the International-Erie railroad, are the important features of the plans proposed by the applicant, and, together, would furnish their fair share of remuneration to a railroad such as the applicant proposes to build. But the Canadian road is not now at the Gorge; the bridge is not built; and there is no legal authority at this time to construct the four miles of road to Hinman. Such is the actual situation at this time, and its mere statement indicates that the plans of the applicant are based very largely upon that faith which has been aptly described as "the substance of things hoped for, the evidence of things not seen."

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It has also been suggested that a certificate be granted conditioned upon the building of the bridge and extension of the Canadian Northern, and that no construction be permitted beyond Hinman until those projects became realities; there are several objections to this course, the chief one being that it would be utterly unlawful, for the reason that the action of the Commission is required to be taken upon the facts as they exist at the time the certificate is granted.

A further objection may be stated in the form of argument, that if the construction of the road is to be deferred until the happening of these events, and as they could not be realized within a year at least, then no harm can come to the applicant by a denial of the application herein, because the statute authorizes a renewal of the application after the expiration of one year from the date of an order of refusal by the Commission. This renewal may be for the whole of the original route, or, after proper proceedings being taken, may be for any part of such route; and, although no intimation is intended regarding any action to be taken on such new application, there will undoubtedly be many important facts and circumstances then presented which are now absent.

There is another serious question in this case to which the parties have given very little attention, but which the Commission has viewed with great concern, and that is the matter of crossing nearly a score of public highways at grade along the route of this railroad, and several of these are improved and much traveled State roads.

It is the settled policy of the State that all existing dangerous crossings of railroads and highways at grade should be abolished. This plan comprehends the expenditure of vast sums of money, the greater part of which is contributed by railroads and the State. Millions of dollars have already been spent, and millions more will be spent in the future, for the elimination of those grade crossings which were established in the early years of railroad building. Having this in mind, it seems hardly consistent for the Commission to authorize such expenditures by the State, the municipalities and the railroads, for the purpose of removing these danger spots

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throughout the State, and at the same time permit the creation of new grade crossings by the wholesale, such as the applicant purposes in the construction of this railroad. The Commission does not pass upon this question in this case, because the decision here made is based upon other grounds; but it is deemed proper at this time to bring this very serious problem to the attention of the parties, to the end that, in the event of new proceedings being instituted for the construction of said railroad or any part thereof, some feasible plan may be devised whereby the grades of the railroad and the highways may be separated.

The performance of public duty is not always hand in hand with what might be one's sympathetic inclination if the question were considered alone in the abstract. And in a case like this, performance of such a duty may not be avoided because the result is at variance with the ardent desires and convictions of those who believe they should be allowed, with their own money and at their own risk, to exploit what they consider to be essentially a public enterprise. Their argument in this respect of course appeals as one *ad hominem*; but not persuasively enough to overcome the requirements of the statute that this Commission shall find a necessity for a public utility before certifying that such necessity exists. It would be a satisfaction if the Commission were permitted to enter with generous co-operation into the plans of those who have this enterprise in hand, unhampered by any requirements or restrictions of the statute. But such a course cannot, and should not, be taken. We should leave to no one our share of responsibility in this matter, by failing to make an unequivocal decision, which the law has imposed upon the Commission as one of its fundamental duties.

Upon the whole case, it is hereby found and determined —

First, that the Commission is without legal authority to divide the route proposed by the applicant, and grant a certificate of public convenience and a necessity for any part of such route, or to grant such certificate conditioned upon the happening of any future event;

Second, that the applicant has failed to show that public con-

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venience and a necessity require the construction of a railroad as proposed in its certificate of incorporation;

Third, that the application herein should be denied.

All concur except Emmet, Commissioner, who files a dissenting opinion.

EMMET, Commissioner (dissenting).—This application aims partly at the establishment of a very desirable physical connection at Hinman between the Buffalo, Lockport and Rochester railroad and the International and Erie systems, the public necessity for which has in my opinion been amply proved, and partly at the construction of a new electric railroad from Hinman to the Niagara frontier — the value of which latter project to the public seems at the present time to be somewhat problematical. Into these two separate and distinct plans the route of the new railroad which it is proposed to build between Lockport and the Niagara river would, under ordinary circumstances, prove susceptible of perfectly natural subdivision. For the purposes of our present decision, however, it seems that we cannot separate the route in this manner — granting a certificate for part of it and refusing one as to the remainder. The application must, as the law now reads, stand or fall in its entirety in the form in which it has been presented to us by those who propose to invest their money in the new enterprise. I entirely agree with my colleagues upon that point.

In order to dispose of the present case justly, therefore, we must decide whether, in our opinion, the public interest would be better served by a rejection of the entire application because the necessity of the Hinman–Niagara river extension has not been proved, or by an approval of the entire application because a public need for the connection at Hinman between the Buffalo, Lockport and Rochester railroad and the Erie and International systems has been shown. The fact that the law requires us to treat the plan which has been laid before us as an entirety does not mean, as I understand it, that we must of necessity deny the entire application because we think that it is in part superfluous,

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or even undesirable. We have a perfect right, I take it, to decide that the entire application shall be granted if those features of it which have been shown to be greatly in the public interest strike us, on the whole, as outweighing in importance the features which have not been supported by proof of public necessity.

Feeling, as I do, that the connection at Hinman between the Buffalo, Lockport and Rochester railroad and the Erie and International systems, which the present plan provides for, is, within a proper meaning of the term, a "necessity" from the standpoint of the public, and that the extension from Hinman to the Niagara river, while not exactly necessary at present, might at least prove to be a convenience to the public without seriously injuring anyone, I have come to the conclusion that the reasons for granting this application in its entirety are stronger, on the whole, than any reasons which have been or can be advanced for its rejection.

That the New York Central Railroad Company, which at present serves the neighborhood between Lockport and the Niagara Frontier, would be entitled to protection at the hands of this Commission if the competition threatened by this new line seemed to the Commission to be of a kind which might prove ultimately ruinous to both competitors, and therefore injurious to the public itself, I am well aware. I should doubtless consider it my duty to vote against the present application, notwithstanding the desirable features of it to which I have already made reference, if I really thought that the granting of it meant that some material injury would fall upon the great transportation system which now, through one of its branch lines, serves the region between Lockport and Niagara Falls. Anything which seriously threatens to impair the present efficiency of a railroad like the New York Central, upon which vast populations are absolutely dependent, must under existing conditions be regarded not merely as dangerous to the owners of the property in question, but as a menace to the public at large. I cannot think, however, that the New York Central Railroad Company would be materially injured by our permitting about fourteen miles of new track to be built by a competing company between Hinman and the Niagara river. It was not, as I understand it, the pur-

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pose of the framers of the Public Service Commissions Law to forbid competition under any and all circumstances between public utilities operating in a single field. The intention, rather, was that competition should be discouraged only in cases where, in the judgment of the Commission, it threatened to become so wasteful and injurious to both competitors as ultimately to affect the ability of either, or both, to give the public decent service. If this new road were to be built, I think the public would be almost certain to get better service from the New York Central and Niagara River and Eastern railroads, jointly, than it now receives from the New York Central alone.

Whether, if this application should be granted, the Niagara River and Eastern project would turn out to be a very profitable venture for its promoters, is of course another question entirely, and one upon which I am not prepared at this time to express any definite opinion. I do not understand it to be necessary, in order to justify the issuance of a certificate of public convenience and a necessity in a case like this, that we should first conclude that the applying company is assured, beyond peradventure, of a prosperous financial future. Whether or not the new road, if built, would be able to conduct a lucrative business between the Niagara river and Lockport, I am convinced at any rate that the result of the experiment would not be to injure the road which now serves this neighborhood enough to warrant our withholding from the people of western New York whatever benefits may attach to the possession of an electric line from Lockport to the frontier, in addition to the steam transportation facilities which they already enjoy.

I think that the present application should be granted, rather than denied, for the reasons I have mentioned; and therefore I dissent from the conclusions to which a majority of my colleagues have come.

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In the Matter of FIXING STANDARDS FOR THE MEASUREMENT OF PURITY, ILLUMINATING POWER AND HEAT OF GAS to be Manufactured, Distributed or Sold by Persons, Corporations or Municipalities for Lighting, Heating or Power Purposes

Case No. 1502

(Public Service Commission, Second District, October 11, 1916)

Authority of the Commission to regulate the measurement of gas furnished the public.

The Public Service Commissions Law, paragraph 3 of section 66, as amended, provides that the Commission have power to establish standards of measurement as to the purity, illuminating power and heating power of gas for lighting, heating or power purposes. Through a committee the Commission investigated the entire matter and subsequently decided that a change from the present illuminating standard to a heat unit standard of gas should be established. Details of method whereby the necessary changes are made.

BY THE COMMISSION.—In pursuance of the authority created by paragraph 3 of section 66 of the Public Service Commissions Law, as amended by section 2 of chapter 504 of the Laws of 1913, which among other things provides that this Commission shall “have power by order to fix from time to time standards for the measurement of the purity of gas and for the measurement of the illuminating power of gas and for the measurement of the heating power of gas to be manufactured, distributed, or sold by persons, corporations, or municipalities for light, heating, or power purposes, notwithstanding that another standard for the measurement of any thereof may have been fixed by statute;” and after an exhaustive investigation of the conditions governing the choice of a proper quality standard for manufactured gas by a joint committee on calorimetry of the Public Service Commission and gas corporations in the second public service district of the State of New York, the printed report of which committee and of its conclusions and recommendations under date of March 6, 1913, having been duly made to and filed with this Commission; and after

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further and extended inquiry and consideration by this Commission, and various public hearings held in the cities of Albany and New York and elsewhere in this State; and this Commission being unanimously and unreservedly of opinion that a change from the present illuminating standard to a heat unit standard of gas properly should be provided and established, it is hereby

Ordered, 1. That on and after January 1, 1917, all coal gas, carburetted water gas, and mixed coal and carburetted water gas, manufactured and sold by persons, corporations, and municipalities, in amounts exceeding 20,000,000 cubic feet per annum, for light, heat, or power, shall, when measured at the place provided for making the test and corrected to a temperature of sixty degrees F., and a pressure of thirty inches of mercury, have a monthly average total heating power of not less than 585 British thermal units per cubic foot, and shall not for any three consecutive days in such month average more than 5 per cent below 585 British thermal units per cubic foot. The test to determine the heating value of the gas shall be made according to approved methods, within a two mile radius of the manufacturing plant, at a location selected by the company or municipality and approved by the Commission, such location however to be subject to change by the Commission; provided, however, that where manufactured gas is delivered to the mains at a pressure above five pounds per square inch, it shall be tested for heating value before compression.

2. That each 100 cubic feet of said gas shall contain not more than ten grains of ammonia, nor more than thirty grains of sulphur compounds.

3. That the gas sold, or manufactured and sold, shall exhibit no trace of hydrogen sulphide when tested as follows: If a strip of white paper moistened with 5 per cent by weight solution of acetate of lead, and exposed to a current of gas flowing at a rate of about five cubic feet per hour, does not after thirty seconds of such exposure become discolored, the gas shall be considered to contain no hydrogen sulphide.

4. That every person, corporation, and municipality selling gas to the public shall keep posted in its principal office, in a place readily accessible to its customers, a statement of the average daily

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heating power of the gas furnished during the preceding calendar month, in order that the consumers and the public may be advised of the quality of the gas being supplied; all such records shall be permanently retained by the respective compilers thereof and shall be at all times available for examination by this Commission.

5. That in case any person, corporation, or municipality subject to this order is unable to provide and install before January 1, 1917, proper apparatus, tested and certified to be correct by this Commission, for measuring the heating power of the gas manufactured or sold by it, application may be made by such person, corporation, or municipality for an extension of the time within which this order shall take effect as to such person, corporation, or municipality. If upon such an application it appears that due diligence has been used, a reasonable extension may be granted; provided, however, that until the expiration of any such extension the standards at present in force shall obtain and be observed by the person, corporation, or municipality in whose favor such extension shall have been granted.

6. That except as herein otherwise provided, the order of the Commission of Gas and Electricity entered June 15, 1907, and all other requirements relating to standards of heating power, illuminating power, and purity of gas manufactured and sold by persons, corporations, and municipalities for light, heat, or power purposes, are hereby superseded by this order, pursuant to the authority vested in this Commission.

7. That any person, corporation, or municipality manufacturing and selling less than 20,000,000 cubic feet of coal gas, carburetted water gas, and mixed coal and carburetted water gas, per annum for light, heat, or power, may, with the approval and consent of this Commission, adopt the standards created by and become subject to the other provisions and requirements of this order, precisely as in the case of persons, corporations, or municipalities manufacturing and selling in excess of 20,000,000 cubic feet of gas per annum.

8. This order is intended to relate only to the creation and establishment of a heat unit standard in place of the existing

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illuminating power standard for gas, and is not intended to in anywise affect existing tariff schedules, rates, or lighting contracts now in force in the second public service district of the State of New York.

In the Matter of the Complaint, under Section 53, Railroad Law (Chapter 559, Laws of 1915), of JOHN J. McINERNEY as Counsel of NEW YORK STATE MOTOR FEDERATION, INC., against RECEIVERS, ROCHESTER, SYRACUSE AND EASTERN RAILROAD COMPANY, Asking that Gates be Placed at a Point Where the Penfield Road Highway and Said Company's Railway Cross at Grade Near Brighton, Monroe County

Case No. 5587

(Public Service Commission, Second District, October 11, 1916)

Method of securing protection at a point where a highway and railroad cross at grade.

The New York State Motor Federation, Inc., complained against the receivers of the Rochester, Syracuse and Eastern Railroad Company on account of the danger at a point on the Penfield road highway, where the railroad's right of way crosses at grade near Brighton, Monroe county. The complainants ask that gates be placed as a protection by the railroad, but by an agreement between the parties the demand for gates was withdrawn upon condition that all local cars bound in either direction should thereafter be stopped on the near side of the street crossing, and that west-bound limited cars should also be stopped in the same manner, and that east-bound limited cars should slow down to a speed of four miles per hour over the said crossing. Several other minor provisions were included in this agreement. All parties having agreed that this method of protection would be preferable to the installation of gates, the Commission ordered the case closed upon its records with leave to either party to reopen same if such course appeared desirable.

BY THE COMMISSION.— Complaint having been made by John J. McInerney as counsel of the New York State Motor Federation, Inc., against the receivers of the Rochester, Syracuse and Eastern Railroad Company under section 53 of the Railroad Law (Laws of 1915, chapter 559), asking that gates be placed at a point where

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the Penfield road highway and the said company's railroad cross at grade near Brighton, Monroe county; and respondents having made answer to the said complaint, and the case having come on for a hearing on the 4th day of October, 1916, at Rochester, N. Y., at which time and place all parties were represented, and an agreement was reached between them to the following effect:

That instead of securing protection for the said crossing by means of gates, all local cars bound in either direction shall hereafter be stopped upon the near side of the said crossing and that west-bound limited cars shall also be stopped in the same manner;

That east-bound limited cars shall slow down to a speed of four miles an hour over the said crossing;

That whistling shall be done away with on all cars which make the stop as aforesaid;

That the shelter which is now upon the west side of the highway shall be moved across to the east side thereof;

That the platform to accommodate traffic shall be placed on the west side of the crossing;

That another crossing signal, similar to the one now in use at this point, shall be placed upon the north side, and

That the signal posts now in use shall be taken down; and the parties in interest having agreed that this method of protecting the said crossing at Penfield road would be preferable to an installation of gates for that purpose, and that upon the agreement of respondents to institute the above mentioned changes the present proceeding may properly now be closed upon the records of the Commission; it is hereby

Ordered, that this case be, and the same hereby is, closed upon the records of the Commission, with leave to either party to move to reopen same at a later date in case such reopening should then appear to be desirable.

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In the Matter of the Complaint of PROPERTY OWNERS on East Main Street Between Jersey Avenue and the Neversink Bridge in Port Jervis, against PORT JERVIS LIGHT AND POWER COMPANY, Asking that the Company Extend its Gas Mains in said Street and Furnish Gas

Case No. 5675

(Public Service Commission, Second District, October 11, 1916)

Light and power companies — application for extension of gas mains denied as unjust to respondent company.

In the village of Port Jervis certain residents filed a complaint herein against the Port Jervis Light and Power Company, because of the refusal of that company to extend its mains on East Main street of the said village. The gas engineer of the Commission was directed by the Commission to visit Port Jervis and investigate personally. Upon the report of the engineer, giving in detail the reasons leading him to the opinion that the extension asked for would be unjust to the company, as it would require the laying of nearly a mile of mains through a section containing a large cemetery, and where the business to be found would be insufficient to compensate the company for the proposed outlay, it was ordered that the complaint be denied.

BY THE COMMISSION.— Certain residents of Port Jervis having complained against the Port Jervis Light and Power Company, asking for an extension of gas mains on East Main street in the village of Port Jervis; and the respondent having filed its answer to the said complaint; and the matter having come on for a hearing at the office of the Commission in the city of New York on Monday, September 18, 1916, at which said hearing only representatives of the respondent were in attendance — the complainants having notified the Commission, after the date of hearing had been fixed, that it would be inconvenient for them to attend a hearing in New York city and that they desired a representative of the Commission to personally visit Port Jervis for the purpose of hearing the views of the complainants; and the respondents, at the said hearing on September 18, 1916, having presented their grounds for believing that the Commission should not make an order at this time directing an extension of respondent's mains on

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East Main street, as asked for by complainants — the respondent contending that the extension asked for would require the laying of nearly a mile of mains through a section which on account of the location there of a large cemetery can never be much developed for building purposes, and that even after the mains had been brought to the neighborhood occupied by complainants the amount of business to be found there would be extremely small and wholly insufficient to compensate the company for its outlay; and thereafter the gas engineer of this Commission, Mr. C. F. Leonard, having, by direction of the Commission, visited Port Jervis and having interviewed a number of the residents in the district for which gas is sought, and having ascertained from a careful canvass of the situation that the business now in sight would, in his judgment, fall far short of an amount sufficient to justify the making of a mandatory order such as is here asked for, and having made a report to the Commission stating this to be his opinion and giving in detail his reasons therefor, and having indicated that in his opinion the only practicable basis for an extension of the mains on said East Main street would be under one of the several forms of agreement which are ordinarily employed in cases where the business in prospect is insufficient to justify an extension of a gas company's mains as a matter of business; and the Commission having considered the testimony and arguments presented at the hearing on September eighteenth on behalf of the respondent, and the facts and conclusions arrived at by its said gas engineer as the result of his personal investigation at Port Jervis and his interviews with the complainants, and having concluded that it would be an improper exercise of its power to make such an order as is asked for at this time, while altogether willing, at any time, to give further consideration to the question of ordering an extension under some proper form of agreement which would provide for contributions, in the first instance, from the prospective consumers, toward the original cost of the extension, and the subsequent repayment of these contributions in the form of regular monthly allowances on the consumers' bills for gas; now, therefore, it is hereby

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Ordered, that this complaint, in its present form, be, and the same hereby is, denied, but that the complainants shall at any time have the privilege of moving to reopen the case at any time that the respondent, upon the matter being presented to it, declares its unwillingness to enter into a reasonable agreement of the kind indicated for the extension of its mains; and that in the meantime this case be, and the same hereby is, closed upon the records of the Commission.

In the Matter of the Complaint of the TOWN OF BRANT, CHARLES NORDBLOOM, and BEMUS PIERCE, against IROQUOIS NATURAL GAS COMPANY, SOUTH SHORE NATURAL GAS AND FUEL COMPANY, UNITED NATURAL GAS COMPANY, FINANCE OIL COMPANY, and RESERVATION GAS COMPANY

Case No. 5393

(Public Service Commission, Second District, October 17, 1916)

Use by a natural gas company of a compressor to equalize the pressure in the service pipes and the transmission line is proper.

The Commission is without jurisdiction to pass upon the use of a compressor, which is alleged to accelerate the flow of gas from natural gas wells, to the injury of complainant, as the public has no interest therein.

A natural gas company, which obtains its product from wells and carries the same through service pipes into a high pressure transmission line, should not be restrained by the Public Service Commission from installing and operating a mechanical device, known as a compressor, to accelerate the flow of gas through the service pipes, and thus increase the pressure to that existing in the transmission line.

On a complaint by landowners, who have leased property for drilling and gas producing purposes, against the lessees, for using a compressor which, according to the complaint, unlawfully and unreasonably increases the flow of gas from the wells, resulting in great prejudice and loss to the complainants, and asking the Commission to restrain the companies from operating such contrivance, the Commission holds that such matters relate to the private rights of the parties and do not concern the interests of the public; and, therefore, the Commission is without jurisdiction to grant the relief demanded.

Complaint dismissed.

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LeRoy Andrus, attorney for the complaints.

Kenefick, Cooke, Mitchell & Bass, attorneys for Iroquois Natural Gas Company and United Natural Gas Company.

Williams, Minard & Howell, attorneys for South Shore Natural Gas and Fuel Company.

George W. Cole, and Thomas L. Newton, attorneys for the Finance Oil Company and Reservation Gas Company.

Hodson, Commissioner.—The town of Brant, Erie county, together with some of its property owners, filed their complaint with the Commission against the Iroquois Natural Gas Company, South Shore Natural Gas and Fuel Company, United Natural Gas Company, Finance Oil Company, and the Reservation Gas Company. The complaint shows that these companies, either singly or together, are engaged in the business of drilling for, selling, producing, and disposing of natural gas in the town of Brant, and elsewhere, and particularly within the boundaries of the Cataraugus Indian Reservation which is partly within the said town.

The theory of the complainants seems to be that the several respondents, or some of them, are violating the Public Service Commissions Law, and that this Commission should intervene to prevent such unlawful practices. The complaint is very general, and upon information and belief, that certain farmers leased their lands to one of such gas companies for the purpose of drilling for gas; that either such leases or the gas produced from the wells were sold to another company, and that one of those companies, or still another, which operates distribution and transmission lines, employs compressors and pumps to accelerate the gas through such lines, thus tending to deplete the supply, and depriving the landowners of their rights and privileges in and to said natural gas and the proper use and enjoyment thereof. A specific complaint is directed against the Iroquois and South Shore companies, which take the gas from several wells in that territory and send it

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through their transmission lines to Buffalo and other distant points, using pumps and compressors for such purpose, which, according to the allegations of the complaint, unlawfully and unreasonably increases the flow of gas from the wells in said town, resulting in great prejudice, disadvantage, and loss to the complainants. The Commission is asked to enjoin and restrain the respondents from operating such contrivances, so that the natural gas in and upon the premises of the complainants may be protected from unreasonable impairment, and their rights thereto may be preserved.

It is quite apparent that at the time this complaint was filed, the complainants were without specific information as to which of the respondent companies worked the gas wells, transported the gas, or operated the compressors along the pipe lines. The answers of the companies have clarified the situation somewhat, and at the hearing held by the Commission in this case, it appeared conclusively that none of the companies has installed or used any pumps, and that the Reservation Gas Company alone has installed a compressor, although the South Shore Natural Gas and Fuel Company has made preparations for such installation, as a precautionary measure, in case there should be a serious drop in the pressure of gas at any point in its system. It also satisfactorily appears from the answers of the respondents, and from the proof in the case, that the Finance Oil Company and the Reservation Gas Company operate certain gas wells in the town of Brant, and sell their product to the Iroquois Natural Gas Company, delivering the same through service pipes into the high pressure transmission line of the latter company, whereby it is conveyed to the city of Buffalo and other places and there sold and delivered to consumers. The pressure of the gas as it comes from such wells, and passes through such service pipes, is far below the pressure maintained in said transmission line, and it, therefore, becomes necessary to use this mechanical device, called a compressor, in order to maintain a pressure in the service pipes equal to the line pressure of the Iroquois company's transmission. To meet this necessity, the Reservation Gas Company has, for some time, operated a compressor at a point on its service line far removed from the

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wells, which takes up the gas as it comes from the wells, and sends it on to such transmission line at an increased pressure. No pump is employed in this operation, and no compressor is used at any well; and the respondents maintain that the flow of gas from the wells is neither increased nor diminished by the use of the compressor.

There is substantial agreement between the parties as to these facts, except that it is contended by the complainants that the operation of the compressor is in the nature of a pump, which creates vacuums at the wells, and, by suction, takes more gas therefrom than would flow in a natural way. This claim is not supported by any proof. Opposed to this is the theory advanced by the respondents, that the office of such compressor is merely to take up the gas and accelerate its flow through the pipes, and does not increase the volume of gas as it comes from the wells; this theory is fortified by the long experience of the companies as large producers and distributors of natural gas, and if their conclusion is correct, then it follows that such device is in no sense unlawful or unreasonable, and the respondents should not be restrained in its use.

But the respondents in this case raise a jurisdictional question by making the further point that the claims of the complainants relate to the fundamental property rights of the parties, and are not directed to the service or practices of the respondents as public utilities. There is great force in this argument, when it is considered that all the gas obtained from the wells in the town of Brant is produced under and pursuant to written contracts between the landowners and the companies. These contracts provide that the companies may go upon the land and drill for and obtain natural gas for commercial purposes; and it goes without saying that distribution and transmission lines must be maintained for the purpose of conveying the gas to a profitable market. All the rights and interests of both parties are or should be defined in such contracts, particularly in relation to the production and disposition of the gas, the amount thereof, and the compensation to be received by the landowner. If these things are not provided for, and either party is desirous of construing or reforming the

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agreement, or enforcing the same by injunction or otherwise, the place for such action is a court of equity and not the Public Service Commission.

It will be borne in mind that the complaint herein is not directed to any of the subjects which are mentioned in section 66 of the Public Service Commissions Law, which constitute the sum total of the Commission's jurisdiction in this class of cases. True, we have general supervision of gas corporations, and may investigate their franchises, practices, rates, and service; we may also prescribe extensions and improvements for a gas plant, where public health, good service, or protection of gas users require the same; and this means that the Commission is charged with the duty of ascertaining and determining whether the equipment and appliances of a gas company are safe, efficient and adequate for the security and accommodation of the public, and in compliance with its charter and franchises and the provisions of law, and to remedy any defects which may be found; but nowhere in the law can be found any provision that delegates to this Commission power to supervise the contracts referred to, and determine the individual rights of the parties thereto. The authority of the Commission is confined to the operations of the gas companies as public utilities, and has no concern with the private controversies which they may have with others. It will not be seriously contended that this Commission would have the authority to put a gas company in possession of a producing well, even after being wrongfully excluded therefrom by the landowner; no more have we the right to say that gas shall be taken from the well only in certain quantities or at certain times. Such matters relate to the private property rights of the parties, which must not be confounded with the interests of the public.

The Supreme Court is the tribunal where the conflicting claims of the parties may be determined. After that, and when the company seeks to distribute its gas to the public, this Commission is empowered to regulate and control the practices and service of the company, in the manner and to the extent prescribed by section 66 of the Public Service Commissions Law.

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Nothing more need be said upon the questions involved in this case, for it has been made clear that the Commission has no jurisdiction to grant the relief sought by the complainants herein, and an order should be entered dismissing the complaint.

All concur.

In the Matter of the Petition of FRONTIER ELECTRIC RAILWAY COMPANY as to its Railway Proposed to be Constructed in and between Buffalo and Niagara Falls, Crossing Certain Streets and Highways and Creeks; also as to Certain Franchises

Case No. 5673

(Public Service Commission, Second District, October 17, 1916)

Determination as to how the cars of an electric railway shall pass over streets, highways and creeks between Buffalo and Niagara Falls, such railway not being a street surface railway—enumeration of the various street crossings and determination as to which crossings shall be over and which shall be under highway.

The Frontier Electric Railway Company filed its petition with the Commission for a determination as to how its electric railway, which is to be at first a single track with possible additional tracks in the future, and which it is proposed to construct between the cities of Buffalo and Niagara Falls, shall cross certain streets and highways and certain creeks, and also as to the exercise of franchises now held by it.

Cohn, Chormann & Franchot, attorneys for Frontier Electric Railway Company.

Hoyt & Spratt, attorneys for the New York Central Railroad Company.

BY THE COMMISSION.—A petition having been filed with this Commission by Frontier Electric Railway Company for a determination of how its electric railway (single track at first, with possible additional tracks in the future) proposed to be constructed in and between the cities of Buffalo and Niagara Falls shall cross certain street and highways, and certain creeks, and as to exercise of certain franchises; and a public hearing on said petition after due notice having been held in the city of Albany

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on September 6, 1916, at which those named hereinabove appeared; and it appearing that this proposed railway is to be laid adjacent to and at the same grade substantially as an extension of the International railway proposed to be constructed in and between said cities, in respect to which an order was made by this Commission on January 13, 1916, providing a method by which said extension shall cross streets and highways; and it appearing that the proposed railway is not a street surface railway;

1. Now, after due consideration, this Commission hereby determines, under section 89 of the Railroad Law, that it would be impracticable for the said railway of the Frontier Electric Railway Company to cross otherwise than at grade the streets and highways hereinafter named in the municipalities hereinafter named except where a method of crossing otherwise than at grade is hereinafter named, and in such cases this Commission hereby determines that such crossing shall be over or under the street or highway as hereinafter set forth, to wit:

City of Buffalo: At grade the south one-half of Kenmore avenue, and any other alleged streets intersected by the route between Kenmore avenue and Main street.

Town of Tonawanda (Erie county): At grade the north one-half of Kenmore avenue; at grade Englewood avenue; at grade Belmont avenue (or Ochs road); at grade Schell road.

City of Tonawanda: Over the Williamsville road highway by an overhead bridge carrying said railway over the street; over the Ellicott creek road highway by an overhead bridge carrying said railway over the street; over Tonawanda creek road highway by an overhead bridge carrying said railway over the street.

City of North Tonawanda: Over Sweeney street by an overhead bridge carrying said railway over the street; over Tremont street by an overhead bridge carrying said railway over the street; over Goundry street by an overhead bridge carrying said railway over the street; over Christiana street by an overhead bridge carrying said railway over the street; over Schenck street by an overhead bridge carrying said railway over the street; over Ransom street by an overhead bridge carrying said railway over the

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street; over Robinson street by an overhead bridge carrying said railway over the street; over Wheatfield street by an overhead bridge carrying said railway over the street; at grade Payne avenue; at grade Linwood avenue; at grade Fredericka street; at grade East Felton street; at grade Jackson avenue; at grade Stenzel street; at grade Ward road; at grade Witmer road; at grade any other alleged streets north of Wheatfield street to the city line, including Sixteenth street, Seventeenth street, Eighteenth street, and Nineteenth street, which the proposed railway may intersect.

Incorporated village of LaSalle: At grade the Military road; at grade Main street; at grade Brickyard road (or Tompkins street); at grade Gombert street; at grade Griffin street; at grade Evershed street (or avenue); at grade any other alleged streets in said village which the proposed railway may intersect.

City of Niagara Falls: At grade Evershed street (or avenue); at grade Roxbury street; at grade Sugar street; at grade Packard road; at grade Twenty-seventh street; at grade Twenty-fourth street; at grade Twenty-second street; at grade Cross street; at grade any other alleged streets in said city lying between the easterly city line and Portage road which the proposed railway may intersect.

Upon condition, however, that it is understood by this Commission and the said Frontier Electric Railway Company, that the said railway, although to be operated by electrical power, is one to which the provisions of the so-called grade crossing law (sections 89-99 Railroad Law) applies.

The matter of crossings by this railway of other railroads is not now determined.

2. This Commission, under section 21 of the Railroad Law, hereby consents that said Frontier Electric Railway Company may construct and maintain bridges for the purposes of its railway over the following creeks: Gill creek, in the city of Niagara Falls, Niagara county, N. Y.; Cayuga creek, in the village of LaSalle, Niagara county, N. Y.; Tonawanda creek, between the county of Niagara and county of Erie; Ellicott creek, in the city of Tonawanda, Erie county, N. Y.; Mill creek, in the city of Tonawanda, Erie county, N. Y.

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3. Pursuant to the provisions of section 53, Public Service Commissions Law, the permission and approval of this Commission are hereby given to the exercise by said Frontier Electric Railway Company of the following franchises received by it since it was granted a certificate of public convenience and a necessity under the then section 59 of the Railroad Law, to wit:

City of Buffalo: Franchise granted January 11, 1915, by the board of aldermen, February 10, 1915, by the board of councilmen (after amendment), February 15, 1915, by the board of aldermen (concurrence in amendment), and approved by the mayor March 1, 1915, and accepted by said Frontier Electric Railway Company, October 11, 1916; and an amendment of said franchise made by the board of aldermen November 15, 1915, by the board of councilmen November 17, 1915, and approved by the mayor November 29, 1915, copies of which certified by the city clerk are filed with the papers in this case.

City of Tonawanda: Franchise granted by the common council and various amendments and extensions, which franchise and amendments and extensions were approved by the mayor, copies of which certified by the city clerk are filed with the papers in this case; the dates of the franchise, approvals by mayor, amendments, extensions, and acceptances by company being respectively November 22, 1911; December 27, 1911; February 17, 1912; February 20, 1912; November 23, 1911; January 3, 1912; June 3, 1914; June 16, 1914; June 4, 1914; November 4, 1914; January 22, 1915; November 14, 1914; July 21, 1915; July 23, 1915; December 8, 1915; December 28, 1915; December 13, 1915; September 6, 1916; September 12, 1916; September 19, 1916.

City of North Tonawanda: Franchise granted by the common council, amendments and extensions, which franchise and amendments and extensions were approved by the mayor, or otherwise became effective, copies of which certified by the city clerk are filed with the papers in this case; the dates of the franchise, approvals by mayor, statement of effective dates of franchise, amendments and extensions, and acceptances by company being respectively September 12, 1911; September 22, 1911; October

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17, 1911; October 27, 1911; February 6, 1912; February 16, 1912; February 17, 1912; June 2, 1914; June 12, 1914; June 16, 1914; December 28, 1914; December 29, 1914; January 22, 1915; November 9, 1915 (this last date, to wit, November 9, 1915, being the date of a resolution of the board of public works of the City of North Tonawanda, certified by the secretary of said board); November 16, 1915 (this date appearing by the date of acceptance); November 26, 1915; December 31, 1915; September 5, 1916; September 12, 1916; September 15, 1916.

City of Niagara Falls: Franchise granted by the common council July 18, 1910, which became effective July 25, 1910, and the acceptance of which by the company is dated August 30, 1910, copies of which certified by the city clerk are on file with the papers in this case.

This determination is not intended, nor shall it be construed, to authorize any construction work in or upon any State or county highway unless and until consent to and approval of such construction work shall have first been duly given by the State Commission of Highways.

In the Matter of the Application of the NEW YORK CENTRAL RAILROAD COMPANY to Join with the CANADIAN PACIFIC RAILWAY COMPANY, the MICHIGAN CENTRAL RAILROAD COMPANY, and the CANADA SOUTHERN RAILWAY COMPANY in Jointly and Severally Guaranteeing \$2,000,000 of 4½ per cent Consolidated Mortgage Gold Bonds, Series A, of the TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY

Case No. 5713

(Public Service Commission, Second District, October 17, 1916)

Proposition submitted to Commission whereby the New York Central Railroad Company, together with other railway corporations, may jointly and severally guarantee certain bonds of the Toronto, Hamilton and Buffalo Railway Company.

The petition herein was filed September 19, 1916, and in October following a hearing was had in regard to the application of the New York Cen-

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tral Railroad Company for permission to join with the Canadian Pacific Railway Company, the Michigan Central Railroad Company, and the Canadian Southern Railway Company, in jointly and severally guaranteeing the principal and interest of \$2,000,000 of 4½ per cent, fifty-year consolidated mortgage gold bonds of the Toronto, Hamilton and Buffalo Railway Company. The four corporations in question own the entire outstanding capital stock of the Toronto, Hamilton and Buffalo Railway Company. The proceeds of the sale of bonds will be used by the last named road to pay its unfunded debt and for its corporate capital purposes. Order granted.

BY THE COMMISSION.—The petition herein by the New York Central Railroad Company is for authority to join with the Canadian Pacific Railway Company, the Michigan Central Railroad Company, and the Canada Southern Railway Company in jointly and severally guaranteeing the principal and interest of \$2,000,000 of 4½ per cent Series A, fifty-year consolidated mortgage gold bonds of the Toronto, Hamilton and Buffalo Railway Company.

It appears that the outstanding capital stock of the Toronto, Hamilton and Buffalo Railway Company is owned as follows: 16,766 shares by the New York Central Railroad Company, 12,246 shares by the Canadian Pacific Railway Company, 9,842 shares by the Michigan Central Railroad Company, and 6,271 shares by the Canada Southern Railway Company. The \$2,000,000 face value of bonds, to guarantee payment of which leave is prayed, have been issued and sold jointly to the four corporations which own the entire outstanding capital stock of the Toronto, Hamilton and Buffalo Railway Company for \$1,800,000 in cash, the New York Central Railroad Company contributing \$450,000 of this purchase price, the Canadian Pacific Railway Company \$900,000, the Michigan Central Railroad Company \$225,000, and the Canada Southern Railway Company \$225,000. The proceeds of such sale will be used by the Toronto, Hamilton and Buffalo Railway Company to pay its unfunded debt, representing expenditures incurred on capital account, and for its corporate capital purposes.

It further appears that in order to make said bonds more readily marketable at what is considered a fair price, the peti-

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tioner and the other immediate purchasers mentioned desire to guarantee jointly and severally the principal and interest on said bonds as they become due.

Now, therefore, upon the foregoing record, ordered as follows:

1. That the New York Central Railroad Company is hereby authorized to join with the Canadian Pacific Railway Company, the Michigan Central Railroad Company, and the Canada Southern Railway Company in jointly and severally guaranteeing the payment of the principal and interest of \$2,000,000 Series A, fifty-year consolidated mortgage gold bonds, bearing interest at the rate of $4\frac{1}{2}$ per cent per annum, of the Toronto, Hamilton and Buffalo Railway Company, secured by a mortgage dated August 1, 1916; provided, however, that if, as a result of a resale of any or all of its \$500,000 of said bonds the New York Central Railroad Company shall realize a net sum in excess of the amount paid by it for said bonds (to wit, the sum of \$450,000), it shall hold such excess sum or profit unexpended in its treasury until it has reported the purposes for which it proposes to use the same to this Commission and has received the Commission's approval thereof.

2. That the New York Central Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing what if any of such guaranteed bonds of the Toronto, Hamilton and Buffalo Railway Company which it owned it has sold, the dates of such sales, and the prices received. Such reports shall continue to be filed until it has reported the sale of all of such guaranteed bonds held by it.

3. That the New York Central Railroad Company shall within thirty days from the service of this order advise this Commission whether or not it accepts this order with all its terms and conditions.

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In the Matter of the Application of the NEW YORK CENTRAL RAILROAD COMPANY for Authority to Acquire the Entire Capital Stock of the DOLGEVILLE AND SALISBURY RAILWAY COMPANY and to Merge the said Company into Itself

Case No. 5714

(Public Service Commission, Second District, October 17, 1916)

Permission sought to merge Dolgeville and Salisbury Railway Company into the New York Central Railroad Company.

The applicant, the New York Central Railroad Company, is authorized to acquire and hold 1,500 shares each of the par value of \$100, aggregating \$150,000 of the Dolgeville and Salisbury Railway Company's stock. The petition was filed herein September 22, 1916, and a hearing was had October 13, 1916. The permission to merge is granted by the Commission, provided the New York Central Railroad Company shall have acquired all of the said stock, and that it report to the Commission what stock it has acquired.

BY THE COMMISSION.— Ordered 1. That the New York Central Railroad Company is hereby authorized to acquire and hold 1,500 shares each of the par value of \$100, aggregating a total par value of \$150,000, of the capital stock of the Dolgeville and Salisbury Railway Company.

2. That the New York Central Railroad Company and the Dolgeville and Salisbury Railway Company are hereby permitted to merge and such merger is approved; and consent is hereby given to the exercise by the former of all the rights, privileges and franchises of the Dolgeville and Salisbury Railway Company; and within thirty days after such merger shall have become effective the New York Central Railroad Company shall file with the Commission a verified report setting forth the exact date of such merger.

3. That the New York Central Railroad Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such

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period a verified report showing what stock of the Dolgeville and Salisbury Railway Company has been acquired under the authority of this order and the date of such acquisition. Such reports shall continue to be filed until the New York Central Railroad Company shall have acquired all of the stock of the Dolgeville and Salisbury Railway Company which it is herein authorized to acquire and if during any period no such stock was acquired the report shall set forth such fact.

4. That the company shall within thirty days of the service of this order advise the Commission whether or not it accepts the same with all its terms and conditions.

In the Matter of the Petition of the PORT HENRY LIGHT, HEAT AND POWER COMPANY under Section 69 Public Service Commissions Law for Authority to Make a First Mortgage for \$1,000,000, to Issue \$477,000 in Bonds, and to Issue \$100,000 Common Capital Stock

Case No. 5677

(Public Service Commission, Second District, October 17, 1916)

Light, heat and power companies — application for authority to make a first mortgage and to issue bonds and common capital stock.

The Port Henry Light, Heat and Power Company applies for authority under section 69 of the Public Service Commissions Law to issue a first mortgage in the amount of \$1,000,000, to issue bonds to the amount of \$477,000 and common capital stock to the amount of \$100,000. The record in this case shows that the petition was filed on August 24, 1916, that the report of the division of capitalization was submitted under date of September 14, 1916, and a certificate of the increase of capital stock was filed September 20, 1916, the reports of the division of light, heat and power in reference hereto were filed September 26, 1916, and October 14, 1916. The form of the proposed mortgage was filed with the Commission under date of September 28, 1916, and the final report of the division of capitalization bore date of October 2, 1916.

BY THE COMMISSION.— Ordered as follows:

1. That the Port Henry Light, Heat and Power Company is hereby authorized to execute and deliver to the New York Trust Company, as trustee, a certain indenture, deed of trust or mort-

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gage upon all its plant and property, dated the 1st day of August, 1916, to secure an issue of first mortgage thirty year gold bonds bearing interest at the rate of 5 per cent per annum, payable semi-annually on the first days of February and August in each year to the aggregate amount of \$1,000,000 face value, an amended copy of which has been filed with the Commission herein, and that the form of such indenture as amended so filed is hereby approved; provided that said company shall have no right or authority to issue any bonds pursuant to the terms of said mortgage except as herein or hereafter authorized by the Commission.

2. That upon the execution and the delivery of said indenture so authorized there shall be filed with this Commission a copy of the indenture in the form in which it was executed and delivered together with an affidavit by the president or other executive officer of the company, stating that the indenture as executed and delivered is the same as that herein approved by the Commission.

3. That the Port Henry Light, Heat and Power Company is hereby authorized to issue \$414,000 face value of its 5 per cent thirty-year first mortgage gold bonds under the aforesaid mortgage.

4. That the Port Henry Light, Heat and Power Company is hereby authorized to issue \$75,000 par value of its common capital stock which shall be sold at a price not less than the par value thereof to give net proceeds of at least \$75,000.

5. That said bonds of the total face value of \$414,000 shall be sold for not less than 85 per cent of their face value and accrued interest to give net proceeds of at least \$351,900.

6. That said bonds and stock of the face and par value of \$489,000 so authorized or the proceeds thereof to the amount of \$426,900 shall be used solely and exclusively for the following purposes:

(a) For the payment of debt incurred for the following purposes:

1. Construction and equipment of a hydro-electric plant of the petitioner in Port Henry, N. Y., as detailed in Exhibit No. 1 of petition..... \$86,549 00

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2. Purchase from N. Munroe Marshall of certain storage dams, parcels of land, rights of way and flowage and riparian rights on Mill brook and also on McKenzie or Whitney brook in the town of Moriah, as described in Exhibit No. 5 of peti- tion	100,000 00	
		\$186,549 00
(b) Estimated cost of additions and betterments to power plant No. 2 in Port Henry, N. Y., as detailed in Exhibit No. 2 of petition.....		17,568 99
(c) Estimated cost of extension of three-phase circuit to Crown Point and West Crown Point and the installation of a street lighting system as detailed in Exhibit No. 3 of petition.....		18,462 96
(d) Estimated cost of construction and equip- ment of a 44,000 volt, three-phase, twenty-five cycle transmission line from the power house of Witherbee, Sherman & Co. at Mineville, N. Y., to a point near Crown Point village and across Lake Champlain to Bridgport, Vt., as detailed in Exhibit No. 4 of petition.....		58,831 29
(e) Estimated cost of diversion of waters of Mc- Kenzie brook into reservoir of the petitioner on Mill brook as detailed in Exhibit No. 6 of peti- tion		24,391 72
(f) Estimated cost of construction and installation of generating station No. 3 located on Mill brook as detailed in Exhibit No. 7 of petition.....		115,346 96
(g) For legal and miscellaneous expenses.....		5,749 08
		\$426,900 00

in so far as the same may be applicable, provided:

- (1) That such securities or the proceeds thereof shall be applied

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on such new construction summarized in subdivisions (b) and (f) inclusive hereof only in so far as the same is a real increase in the fixed capital of the petitioner and not a replacement of any part of such fixed capital or substitution for wasted capital or other loss properly chargeable to income in accordance with the definitions contained in the uniform system of accounts for electrical corporations adopted by this Commission.

(2) That there shall be no charges to fixed capital on account of engineering services in connection with such construction unless such engineering services shall have been rendered either by other than the regular officers and employees of the corporation, or, in a proper case, where such services may have been rendered by certain of such officers or employees under an express assignment to such construction or improvement work.

(3) That if there shall be required for the aforesaid purposes subject to the limitations herein contained, a sum less than an amount equal to the face and par value of the securities herein authorized, no portion of the proceeds of the securities herein authorized over the actual proceeds thereof so required shall be used for any purposes without the further order of this Commission.

(4) That the unit prices contained in Exhibits Nos. 1, 2, 3, 4, 6 and 7 of the petition are not intended to be and must not be construed by the petitioner as having been determined upon by the Commission as the actual cost of the property and work to be acquired and done and thus properly chargeable to fixed capital, but are intended and shall be construed only to be a present estimate of the probable cost of such property and work, the actual cost of which must be expenditures made as defined in the Commission's uniform system of accounts for electrical corporations.

7. That if the said bonds and stocks of a total face and par value of \$489,000 herein authorized shall be sold at such price as will enable the company to realize net proceeds of more than \$426,900 no portion of the proceeds of such sale in excess of the last aforesaid sum shall be used for any purpose without the further order of the Commission.

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8. That none of the bonds herein authorized shall be hypothecated or pledged as collateral by the Port Henry Light, Heat and Power Company unless any such pledge or hypothecation shall have been expressly approved and authorized by this Commission.

9. That the Port Henry Light, Heat and Power Company shall for each six months' period ending December thirty-first and June thirtieth file not more than thirty days from the end of such period a verified report showing:

(a) What securities have been sold, exchanged or otherwise disposed of during such period.

(b) The date of such sale or disposition.

(c) To whom such securities were sold.

(d) What proceeds were realized from such sale.

(e) Any other terms and conditions of such sale.

(f) With respect to subdivisions (a) and (g) of clause No. 6 of this order there shall be shown in detail the amount expended for each of the purposes specified therein during such period of the proceeds of the securities herein authorized.

(g) With respect to subdivisions (b) to (f) inclusive of clause No. 6 of this order there shall be shown:

1. In detail the amount expended for each of the purposes specified therein during such period of the proceeds of the securities herein authorized and the account or accounts under the uniform system of accounts for electrical corporations to which the expenditures for such purposes have been charged, giving all details of any credits to fixed capital in connection with such expenditures.

2. A summary of the expenditures for each of such purposes during the period covered by the report.

3. A summary showing the expenditures during such period by the prescribed accounts.

In reporting under sections (2) and (3) of subdivision (g) of this clause there shall be further shown the expenditures of the proceeds of the securities herein authorized to the beginning of the period reported upon and a total showing such expenditures to the end of the period, together with a statement of the balances

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in the fixed capital accounts as of the beginning and ending of such period.

Such reports shall continue to be filed until all of said securities shall have been sold or disposed of and the proceeds expended in accordance with the authority contained herein, and if during any period no securities were sold or disposed of or proceeds expended, the report shall set forth such fact.

10. That this proceeding is hereby continued upon the records of the Commission until the accounts of the company have been adjusted in accordance with the findings of the Commission as a result of its examination of the books, accounts and affairs thereof.

11. That the authority contained in this order to issue securities is upon the express condition that the petitioner accepts and agrees to comply in good faith with the provisions hereof and before any securities are issued pursuant hereto and within thirty days from the service hereof, the said company shall file with the Commission a satisfactory verified stipulation duly authorized by its board of directors accepting this order with all its terms and conditions, and such order shall be void and of no force or effect until such stipulation shall have been filed as required herein.

Finally, it is determined and stated, That in the opinion of the Commission the money to be procured by the issue of said securities herein authorized is reasonably required for the purposes specified in this order and that such purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

In the Matter of the Petition of ROCHESTER CONNECTING RAILROAD CORPORATION, under Section 9 of the Railroad Law and Section 53 of the Public Service Commissions Law, for a Certificate of Convenience and Necessity and Permission to Construct and Approval of Corporate Franchises and Rights; and under Section 89 of the Railroad Law as to Crossing Highway

Case No. 5053

(Public Service Commission, Second District, October 19, 1916)

Application of Rochester Connecting Railroad Corporation for authority to construct its line and determination as to crossing highways.

The petitioning company, known as the Rochester Connecting Railroad Corporation, asks for a certificate of public convenience and necessity, to construct its line and to exercise its franchises and rights, also a determination as to the manner in which its tracks shall cross certain public highways along its route. The certificate asked for denied.

BY THE COMMISSION.—The Rochester Connecting Railroad Corporation having applied to this Commission, under section 9 of the Railroad Law and section 53 of the Public Service Commissions Law, for a certificate of public convenience and necessity, and for permission to construct its line and to exercise its franchises and rights, and (under section 89 of the Railroad Law) for a determination as to the manner in which its tracks shall cross public highways along its route; and the matter having come on for hearings before this Commission, and testimony having been presented and arguments made, in support of and in opposition to the granting of the said petition; and it appearing that on July 9, 1914, permission was given by the Superintendent of Public Works of New York State to Messrs. Frank A. Dudley of Niagara Falls and Clifford D. Beebe of Syracuse, to construct, maintain and operate, between certain designated points in the county of Monroe, a single or double track railroad along the so-called "spoil bank" of the Barge canal, which said permission was, by the

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terms of the written instrument granting it, declared to be revocable by the Superintendent of Public Works at any time, the sixth paragraph of the said written instrument providing as follows: "The work authorized by this permit shall be commenced promptly and progressed to completion within three months from the date of this permit; and in the event that such work is not so commenced and completed within such time, this permit shall be deemed to be revoked, and said work shall not be commenced without a renewal of this permit in writing from the Superintendent of Public Works;" and it appearing further that on December 9, 1914, an extension of the said permission, until July 1, 1915, was granted; and that on July 1, 1915, a further extension to January 1, 1916, was granted; and that on December 18, 1915, a further extension to July 9, 1916, was granted; and that on June 26, 1916, a check for \$375 covering a six months' advance payment under the permit was received by the Superintendent of Public Works with an application for a further extension of time until January 9, 1917, and that protests having in the meantime been received by the said Superintendent of Public Works to the granting of such further extension, a date was set for a hearing before the said Superintendent of Public Works, but that none of the parties in interest then appeared, and that no subsequent hearing upon the application has been held or arranged for; and it appearing, further, that the possession of the right or privilege, under the aforesaid permit, to use the spoil bank of the Barge canal for the construction, maintenance and operation of the proposed railroad, is an essential element in the plan for which we are asked to grant a certificate of public convenience and necessity, but that, by reason of the circumstances above set forth, this right and privilege has now entirely ceased to exist, and must, by the express terms of the permit itself, be regarded as having been revoked, and as no longer possessing any force or value whatsoever; and the Commission being of the opinion that this lapsing of petitioner's rights under the aforesaid permit renders it unnecessary that the other questions involved in the present application shall be considered in detail by the Commission in arriving at its decision, and supplies

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in itself ample reason why the Commission should deny the application in its present form ; now, therefore, it is, hereby

Ordered: That the petition of the Rochester Connecting Railroad Corporation for a certificate of public convenience and necessity, and for permission to construct its proposed line of road, and for an order approving of the petitioner's corporate rights and franchises, and for a determination of the method of crossing highways along petitioner's route, be, and the same hereby is denied; and that the case be closed on the records of the Commission.

EDUCATION DEPARTMENT

In the Matter of the Appeal from the Action of the BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT No. 33, Town of Brookhaven, Suffolk County, Appointing Herman Gunther as Clerk and Collector of Said District

Case No. 350

(Decided December 5, 1916)

The consideration of an appeal is not prohibited in a proper case merely because not brought within the prescribed time.

The board of education of union free school district No. 33, town of Brookhaven, Suffolk county, at its annual meeting, appointed William Gunther as both clerk of the board of education and collector of the district. The question here involved is whether both these offices may be held by one and the same person. The only objection to the petition herein is that the latter was not filed within thirty days after the appointments in question. While the statute makes no express declaration that the offices of district clerk and collector shall not be held by one person, the wording of the several sections relating to the election or appointment of district officers indicates the legislative intent that such offices must be held by different individuals. The clerk of a board of education under the law is often required to examine and pass upon fiscal matters within the control of the collector. *Held*, that the duties of the two offices may at times conflict, and hence that it is not appropriate that they should be held by the same person. Appeal sustained.

FINLEY, Commissioner.—At the annual meeting of the board of education of union free school district No. 33, town of Brookhaven, said board appointed Herman Gunther as both clerk of the board of education and collector of the district. This appeal is taken from the action of said board upon the ground that these district offices may not be held by one and the same person. The answer of the board of education does not deny any of the material allegations contained in the petition. It raises the objection merely that the petition was not filed within thirty days after the appointment complained of, and that therefore the matter is not properly

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before the Commissioner of Education. The rules do not prohibit the consideration of an appeal that is not brought within the prescribed time, and where it appears necessary a determination will be made upon the merits, notwithstanding the delay in bringing the appeal. The circumstances are such as to justify a disposition of the matter in accordance with the law and the facts as presented upon the appeal.

While the statute does not expressly declare that the offices of district clerk and collector shall not be held by one person, the wording of the several sections relating to the election or appointment of district officers indicates the legislative intent that such offices be held by different individuals. Section 222 of the Education Law provides that no trustee may hold the office of district clerk, collector, treasurer or librarian; and except for the provisions of subdivision 1 of section 254, the board of education would not be authorized to appoint one of its own members as clerk. While this subdivision expressly authorizes such appointment, no similar authorization is given with respect to the appointment of a collector. See subdivision 4 of said section. If it were intended that the clerk might also hold the office of collector, it would seem that the same provision with respect to the appointment of collector would have been incorporated in the statute as with respect to the appointment of clerk.

The rule is that where the duties of two offices are incompatible in their nature the same person may not occupy both offices. *People ex rel. Harwicker v. Town Board of New Rochelle*, 38 App. Div. 539. Incompatibility in offices exists when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both offices. *Bryan v. Cattell*, 15 Iowa, 538. The clerk of a board of education performs ministerial duties for the board and frequently represents the board in the transaction of district business. In this capacity he is often required to examine and pass upon fiscal matters within the control of the collector. Under such circumstances the duties of the two offices are conflicting, and because of this fact it is not appropriate that the two offices should be held by the same person.

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It appears that Mr. Gunther accepted the offices of collector subsequent to his appointment as clerk. In so doing he vacated his office as clerk, and the board should appoint a competent person as his successor.

The appeal is sustained.

In the Matter of the APPEAL OF FRANK E. CHINLON from the Action of the Board of School Directors of the Second Supervisory District of Chautauqua County

Case No. 349

(Decided December 11, 1916)

Where a person has removed his family and his household goods to a city outside of a district, the subsequent filing by him of a written statement withdrawing his name because of such removal is conclusive.

Frank E. Chinlon was elected school director of the town of Carroll, in the second supervisory district of Chautauqua county, on November 5, 1912, for a period of five years, from January 1, 1913. He qualified as such director in June, 1916, but in May of that year one Edwin Harrington was appointed to fill the vacancy caused by Mr. Chinlon's removal from the town. The question here at issue is as to the residence of the appellant in the town of Carroll. Mr. Chinlon has presented to the department a statement in writing, reciting his belief that he is not entitled to the office, and this statement must be deemed an intent to abandon his residence in the town of Carroll. Under the circumstances, the certificate of appointment of Mr. Harrington as director was absolute, and the board was justified in recognizing him.

Clare A. Pickard, attorney for appellant.

Robert H. Jackson, attorney for respondent.

FINLEY, Commissioner.—It appears that the appellant, Frank E. Chinlon, was elected at the general election held November 5, 1912, as school director of the town of Carroll, in the second supervisory district of Chautauqua county. He was elected for a term of five years, beginning January 1, 1913. He took the constitu-

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tional oath of office within the time required by law, and presented himself as a member of the board of school directors of such supervisory district at the meeting held for the purpose of electing a district superintendent, on June 20, 1916. A question was raised at such meeting as to Mr. Chinlon's right to act as a director from the town of Carroll. It appeared that the town board of such town, at a meeting held on May 12, 1916, appointed Edwin Harrington as a director from such town to fill a vacancy caused by the removal of Mr. Chinlon from the town. The board of directors voted to seat Mr. Harrington as a school director. The appeal herein has been brought from the action of the board in recognizing Mr. Harrington as a director.

The only question involved is as to the residence of the appellant in the town of Carroll. It is established by the evidence that Mr. Chinlon removed his family and his household goods to Union City, Penn., some time subsequent to his election as school director, and was residing there when Mr. Harrington was appointed to fill the vacancy alleged to have been caused by his removal from the town. Some uncertainty is disclosed in the papers as to whether he took up his domicile in Union City, Penn., with the intention of becoming a permanent resident of such place. The facts pertaining to his removal from the town seem to indicate that he had in mind the abandonment of his residence in the town of Carroll.

Since the petition herein was filed, Mr. Chinlon has presented to the Department a written statement to the effect that he does not believe that he has a rightful claim to the office of school director and desires to withdraw his name from the contest. His statement justifies the conclusion that he has abandoned his residence in the town and that therefore a vacancy existed in the office. Such statement must be deemed declaratory of his intent to establish a permanent residence in Union City, and therefore he may no longer be considered a resident of the town of Carroll. It will be assumed that his intent to abandon his residence in the town of Carroll existed at the time the town board filled the vacancy by the appointment of Mr. Harrington, and it must therefore be held that Mr. Harrington was appointed legally as a

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school director in the place of Mr. Chinlon. The board of school directors was therefore justified in recognizing Mr. Harrington as a member of the board.

Since the papers were submitted on this appeal the attorney for the appellant has presented affidavits of members of the town board and others alleging that Mr. Chinlon was, in their opinion, a resident of the town when the board took action with a view of filling the vacancy in the office to which Mr. Chinlon was elected. These papers indicate that persons other than the appellant are interested in the appeal, but they do not disclose any improper motive on the part of the appellant in declaring in substance that he was not a resident of the town of Carroll when Mr. Harrington was appointed as school director. The appellant attached to his opinion a copy of the unconditional appointment of Mr. Harrington to fill the vacancy caused by Mr. Chinlon's departure, which was signed by all the members of the town board. The affidavits of three of the members of the board, above referred to, state that their recollection is that the resolution was only to take effect in case it was ascertained that a vacancy existed in the office. Such affidavits are insufficient to overcome the effect of the certificate of appointment of Mr. Harrington as a director, which was absolute on its face.

It appears upon the record that the board of school directors adjourned pending the determination of the appeal from the action of the board in recognizing Mr. Harrington as a director of the town of Carroll. It will be the duty of the chairman of the board to call a meeting of the board at a convenient time and place, due notice of which must be served upon all of the members of the board. Such meeting should be held within at least twenty days from the date of this decision.

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In the Matter of ACADEMIC INSTRUCTION OF THE CHILDREN of
Union Free School District No. 4, Town of Hempstead, Nassau
County

Case No. 352

(Decided December 28, 1916)

The obligation of a district is not restricted to the furnishing of instruction for the children thereof in so-called elementary or common-school branches.

In July, 1916, fifty-three residents of union free school district No. 4, town of Hempstead, Nassau county, petitioned the board of education thereof that academic instruction be given in the school, or arrangement be made for taking the children of the district prepared for such work to academic schools without the district. The board took the ground that the budget having been already adopted nothing could be done in relation to the matter, because provision for such education had not been made therein. Twenty-six pupils have completed the elementary grades in the district, and a majority of them wish to continue their school work in advance grades. *Held*, that the power of the board is not limited by the provisions of the budget. The policy of the Regents of the University and of this Department recognizes the necessity of providing secondary as well as elementary instruction for the pupils of the public schools. The circumstances in the district in question call for the relief here sought. Appeal sustained.

FINLEY, Commissioner.—It appears from the records of this Department that union free school district No. 4, town of Hempstead, Nassau county, maintains a graded elementary school with a principal and six teachers. During the school year ending July 31, 1916, 317 pupils were registered in attendance at such school; that the assessed valuation of the district was \$782,795; that there was raised by tax in such district for the maintenance of the school \$4,965.81, and that there was available for such maintenance from other sources, exclusive of public moneys apportioned to the district, the sum of \$2,386.49.

The petition herein shows that in July, 1916, fifty-three residents of the district presented a written petition to the board of education thereof, requesting such board to make necessary preparations or arrangements for the instruction in academic sub-

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jects of pupils who have completed the work of the elementary grades of the school in the district, and that if necessary a special meeting of the qualified electors of the district be called for the purpose of appropriating district money to carry out such arrangement. The board of education through its clerk notified the petitioners that, the annual budget for the ensuing year having been made, it would be impossible to grant their request. The matter was subsequently brought to the attention of the board, in behalf of such petitioners, by Francis Dedek, the appellant herein, who requested in writing that the district "either furnish instruction in subjects subsequent to the elementary grades in the school of the district or in the high school or academic department of some other district."

The board of education notified Mr. Dedek that action was taken upon his request and that it was resolved by the board that "inasmuch as the law does not require that the union free school district furnish any other than a common school education, and that inasmuch as the budget adopted at the last annual meeting did not include any fund for an academic course, your letter will be placed on file for further consideration."

The appellant petitions in behalf of himself and other residents of the district and asks that an order be issued directing the board of education of the district either to provide academic instruction in the school in the district or to arrange for the instruction of all pupils in the district who have completed the elementary courses in such school in a high school or academic department in some other district. The petition has not been answered by the board and the facts therein alleged must therefore be deemed to have been admitted.

It appears from the petition that twenty-six pupils completed the work in the elementary grades of the school at the end of the school year of 1915-16, and that a majority of them are desirous of continuing their school work in advanced grades. All but two or three of such pupils are under sixteen years of age, and are therefore compelled to attend school unless they obtain school record certificates and are regularly employed in some useful employment or service. Some of such pupils are under fourteen

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years of age and are not entitled to receive school record certificates and must attend the public school in the district or upon equivalent instruction elsewhere.

The respondent board of education in considering the request of the petitioners has assumed that the requirements of the law as to providing instruction have been fully met when provision is made for the maintenance of a school in which elementary instruction may be given. It was further assumed by the board that it had no authority to increase or alter the tax budget adopted at the annual meeting, and that therefor no resources were available for the desired academic instruction. The determination of this appeal requires the consideration of the adequacy of the provisions which have been made by the respondent board for the instruction of the children of the district.

The statute requires each child between the ages of eight and sixteen residing elsewhere than in a city or a school district having a population of 5,000 or more, to attend upon instruction during the entire time that the school in the district is in session. The instruction required in a public school in such a district must, as a minimum, provide instruction in the six "common school branches" of reading, spelling, writing, arithmetic, English language and geography. See compulsory education provisions of Education Law, §§ 620, 621. A child between the ages of fourteen and sixteen in such a district may be given a school record certificate and be permitted to leave the school and obtain employment when he has "completed the work prescribed for the first six years of the public elementary school." Education Law, § 630.

The Legislature thus prescribed the minimum requirement of compulsory education. It was not the intent or purpose of the statute to establish the principle that if school authorities provided the minimum requirement they had performed fully their duties under the law to the children of the district. There is no provision of the Education Law or of the Constitution which limits the obligation of a district to the furnishing of instruction for the children therein in so-called elementary or common school branches. It is provided in section 1 of article IX of the Con-

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stitution that "The legislature shall provide for the maintenance of a system of free common schools, wherein all the children of the State may be educated." The common schools here referred to are public schools, maintained as a part of the State system of public education by State or by local tax. It is stated in the decision in Matter of the Appeal of Anna R. Pettebone against the Board of Education of the City of New York, recently decided, that "The provisions of the Education Law * * * authorize the establishment of secondary as well as elementary schools to be maintained and supported by public taxes and open and free to all children of the city within the prescribed school ages. * * * High schools being publicly maintained for the free instruction of all children, are free common schools within the meaning of the Constitution."

It is made the duty of a board of education to prescribe courses of study to be followed by the pupils of the schools in the district. Education Law, § 310, subd. 3. The policy of the Regents of the University and of the Education Department recognizes the educational necessity of providing secondary as well as elementary instruction for the pupils of the public schools. The statute does not specifically require that each union free school district shall maintain a high school or academic department; but it does seek to bring instruction in academic subjects, that is, subjects beyond the eighth grade, within the reach of all children by providing that those who reside in districts where academic departments or high schools are not maintained may have State aid in the annual amount of \$20 each for instruction in academic departments or high schools outside of the districts in which they reside, and such districts are authorized to appropriate such additional amounts as may be charged for such instruction. See Education Law, § 493 subd. 6, as amd. by Laws of 1915, chap. 214.

The statute thus confers upon school authorities discretionary power to determine the character and extent of instruction to be given in the schools under their control. The exercise of such power is subject to the supervisory control of the Commissioner of Education. He should in the exercise of such control direct

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and require such official action on the part of school authorities as will provide adequate and appropriate instruction for the pupils of a particular district, having regard for the financial resources and local conditions of such district.

In making provision for the instruction of the children of a district it is essential to apply the provisions of the Compulsory Attendance Law, which requires all children to attend upon instruction until they reach the age of sixteen years unless relieved from such attendance after the age of fourteen for the purpose of employment. Children who have satisfactorily completed the work of the elementary grades prior to the time when they are permitted by law to leave school, ought not to be required to repeat this work. Adequate and appropriate instruction should be provided for them in subjects in advance of the courses of study which they have already pursued.

The financial resources of union free school district No. 4, town of Hempstead, and the number of pupils to be instructed in the schools therein are sufficient to justify either a contract with a neighboring district for their proper instruction or the establishment and maintenance of at least one or two years of instruction beyond the eighth grade, and the employment of a sufficient number of additional competent teachers so that this instruction may be properly given.

The Department cannot overlook the inadequacy of the provisions now made for the instruction of the children of the district who have completed all of the courses which are prescribed by its board of education. It will be the duty of the board immediately to take such action as may be necessary, either by making some suitable provision, through the schools of neighboring districts, for the instruction of such pupils who desire or are required by law to attend, or by the employment of additional teachers and the extension of existing school facilities within the district so as to provide appropriate instruction in academic subjects for the advanced pupils of the district.

The appeal is sustained.

It is hereby ordered that the board of education of union free

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school district No. 4, town of Hempstead, Nassau county, be and it hereby is directed to either provide for the giving of instruction in subjects in advance of the elementary grades in the public school of the district by the employment of additional teachers and the extension of existing school facilities, or to contract immediately with the school authorities of other districts for the payment of the cost of instruction of pupils of the district who desire or are required to attend upon instruction in advance of the elementary grades; and that such board be and it hereby is directed to raise by tax levy, as provided by law, such amounts as may be required to pay the cost of such instruction.

In the Matter of the Appeal of FRANK HILSINGER from an Order Dissolving District No. 1, Town of Maryland, Otsego County, and Annexing the Territory Thereof to District No. 2 of Such Town

Case No. 351

(Decided December 28, 1916)

The action of a district superintendent in dissolving a school district and annexing its territory to that of the consolidated district adjoining approved as being of advantage to the children affected directly by such order.

On April 24, 1916, Menzo Burlingame, district superintendent of schools of the second supervisory district of Otsego county, dissolved district No. 1, town of Maryland, that county, and annexed its territory to district No. 2 of that town. This appeal is brought by the trustee of the dissolved district in behalf of practically all the resident taxpayers of that district who urge that they should not be deprived of their home school without their consent. By a previous order five districts of the said town were consolidated into a district known as No. 2 for the purpose of establishing and maintaining in the incorporated village of Maryland a graded school including courses in agriculture and home-making. The addition of district No. 1 to the combined districts will be a benefit to the children of the dissolved district. Under these circumstances the action of the district superintendent is approved as a wise exercise of his power. Appeal dismissed.

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James J. Byard, Jr., attorney for appellant.

J. S. Waterman, attorney for respondent.

FINLEY, Commissioner.—Menzo Burlingame, district superintendent of schools of the second supervisory district of Otsego county, executed an order on April 24, 1916, dissolving district No. 1, town of Maryland, Otsego county, and annexing the territory thereof to district No. 2 of such town. Frank Hilsinger, the trustee of the dissolved district, in behalf of substantially all of the resident taxpayers of such district, appeals from such order. It appears that the district superintendent in August, 1915, consolidated districts Nos. 2, 6, 7, 11 and 15 of the town of Maryland into a district known as district No. 2. The purpose of such consolidation was to establish and maintain at the unincorporated village of Maryland a graded school and to provide instruction in agriculture and homemaking, under the law and regulations of the Department relating thereto. Extensive improvements to the school building in the district were made subsequently, and rooms were provided and equipment installed for the maintenance of a graded school with two years' instruction in courses in agriculture and homemaking. Five teachers are employed, the principal being a normal graduate and a trained teacher of agriculture.

The school has been established and is maintained under the guidance of the Department and is recognized by it as a school with exceptional facilities for providing instruction for pupils in a rural community. The school as so maintained extends its influence over a considerable territory. The greater number of the pupils come from the farms, and the privileges obtained by them far exceed in educational value those formerly derived from the schools in the districts which were brought into the consolidation. There can be no question that the establishment and maintenance of so strong a central school, with its peculiarly appropriate advantages, has contributed greatly to the social, economic and educational welfare of the residents of the consolidated district. The financial cost of maintaining the school under present

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conditions undoubtedly exceeds that of maintaining the schools in the districts as they formerly existed. There can be no question, however, but that the increased educational opportunities more than make up for the increased cost. No complaint has been heard from the districts brought into the original consolidation. It may be assumed that the residents and taxpayers of such district appreciate fully the greatly improved school conditions brought about by the consolidation and the maintenance of the central school.

The appellants contend that they should not be deprived of their home school without their consent. They complain of the distances which will be required to be traveled by the children of their district if they are compelled to attend the Maryland school. A number of the children in dissolved district No. 1 reside more than five miles from the school in the new consolidated district No. 2. All of the children live on an improved road running through the village of Maryland. It will be feasible to provide transportation during all portions of the year, without hardship to the children. The school authorities of district No. 2 have expressed a willingness to provide such transportation.

While the distances are great, it is nevertheless entirely practicable to bring within the reach of the children of the dissolved district the exceptional advantages of the consolidated school. The school now maintained in the dissolved district is an ordinary elementary school, housed in an old building and with comparatively poor furniture and equipment. The children of the district will be benefited materially by the substitution of the modern school in the consolidated district with its opportunities for vocational instruction in place of the rather inadequate facilities which are now afforded them. It seems clear that the educational interests of the children of the dissolved district will be promoted by the consolidation. It is also clearly apparent that the central school will be more effectively and economically maintained if the resources of the dissolved district are added to those of the consolidated district, so that not only does the order appealed from contribute materially to the school advantages of the chil-

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dren affected directly by such order, but it will also enhance the educational benefits of the entire community.

It would seem, therefore, that the district superintendent had acted wisely in his proposed extension of the boundaries of the consolidated district. The plan of school organization devised for this community should receive Departmental sanction, and I approve the proposed extension of the territorial limits of the consolidated district, with full confidence that the ultimate result will be advantageous to the complaining district and to the entire territory thereby affected.

The appeal is dismissed.

In the Matter of the Appeal of the BOARD OF EDUCATION of Union Free School District No. 2, Towns of Callicoon, Delaware and Bethel, Sullivan County, from an Order Altering the Boundaries of Such District

Case No. 343

(Decided January 2, 1917)

Where all the residents, the district superintendents, the supervisors and the town clerks interested, agreed that the transfer should be made the presumption is in favor of the suitability of such transfer.

Frederick J. Lewis and Charles S. Hick, district superintendents of the first and second supervisory districts, respectively, of Sullivan county, joined in an order altering the boundaries of union free school district No. 2, towns of Callicoon, Delaware and Bethel, Sullivan county, which is a joint district being situated partly in the first and second supervisory districts of that county. This appeal was made by the board of education of union free school district No. 2, towns of Callicoon, Delaware and Bethel. The board of education seems to be the only interest opposed to the action of the district superintendents. As the residents and officials, other than the school board, favor the ordered change and the latter board has failed to present reasons to justify a reversal, held, that the appeal should be dismissed.

Robert B. McGinn, attorney for appellants.

John D. Lyons, attorney for respondents.

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FINLEY, Commissioner.—Union free school district No. 2, towns of Callicoon, Delaware and Bethel, Sullivan county, is a joint district, being situated partly in the first and second supervisory districts of such county. Frederick J. Lewis and Charles S. Hick, the district superintendents of such supervisory districts, joined in an order altering the boundaries of such union free school district by transferring a portion of the territory thereof to school district No. 4, town of Delaware, Sullivan county. Such order was executed April 25, 1916, without the consent of the appellants, the board of education of such union free school district. The district superintendents thereupon associated with themselves the supervisors and town clerks of the towns of Callicoon, Bethel and Delaware for the purpose of determining whether such order should be effectual. A hearing was had before the commission, so constituted, and after giving full opportunity to all the parties to be heard, and taking testimony for and against such order, it was determined unanimously that such order be affirmed. The proceedings were conducted in accordance with the provisions of section 125 of the Education Law. No question is raised as to the regularity or legality of such proceedings. The order of alteration took effect July 25, 1916.

The board of education of said union free school district No. 2, towns of Callicoon, Bethel and Delaware, complains of such order upon the grounds that some portions of the transferred territory are nearer the school at Jeffersonville in such district than to the school at Kenoza Lake, in common school district No. 4, town of Delaware, that such transfer will interfere with the development of the Jeffersonville school, and that the school facilities and educational advantages of that school are superior to those of the school at Kenoza Lake, and that the order will affect injuriously the educational welfare of the children in the transferred territory.

The territory in question was situated, formerly, in a school district which was consolidated with the Jeffersonville district, and in the decision in an appeal brought from such order of consolidation, affirming such order, it was stated that those residents who were so situated that their children could not attend conven-

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iently the school in the consolidated district might be transferred by the district superintendents to other districts. It is apparent that the order appealed from was executed in accordance with such suggestion. The residents in the transferred territory have all expressed their desire to be transferred to the Kenoza Lake district. The district superintendents have agreed that the transfer should be made and it must be presumed that they had in mind the educational interests and welfare of the children affected by the order. The supervisors and town clerks who are familiar with the local conditions expressed by their concurrence their belief that the order would be to the advantage of those concerned. A strong presumption exists therefore in favor of the suitability and reasonableness of the transfer. The appellant board of education has failed to present reasons of sufficient forcefulness to justify a reversal of the order.

The appeal is dismissed.

In the Matter of the Charges against WILLIAM H. WEICK, Head
of the Commercial Department of the Troy High School

Case No. 353

(Decided January 15, 1917)

The removal of a teacher after fair trial had upon notice by a board of education, upon charges of general inefficiency, sustained.

Arvie Eldred, superintendent of schools of the city of Troy, on May 19, 1916, filed with the Troy board of education written charges against William H. Weick, head teacher of the commercial department in the Troy High School. The charges were based upon his alleged general inefficiency as head of such commercial department. The defendant, who is the appellant herein, was served with the charges and a notice of a hearing thereon, and appeared personally and by attorney. A full examination was had covering his work from June, 1911, to February, 1916, and the average result of his work shown in comparison with that of similar departments throughout the State. After a full hearing, the board of education sustained the charges as preferred and removed the appellant from his position as the head of the commercial department

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of the Troy High School. This appeal is brought from such determination of the board. Under chapter 560 of the Laws of 1902, applying only to the cities of Albany and Troy, it is provided that a teacher shall hold the position during good behavior, and shall be removed only for cause after a hearing by the affirmative votes of a majority of the board. Sufficiency of cause rests primarily with the board of education. In this case it was shown that the appellant had failed to comply with suggestions made with due authority as to the plan and scope of his work. This, together with his inability to obtain reasonable results in his work, gives a basis for the board's determination, and it becomes necessary to sustain the action of the board. Appeal dismissed.

William C. Gordon, attorney for appellant.

Owen D. Connelly, attorney for respondent.

FINLEY, Commissioner.—It appears that on May 19, 1916, written charges were preferred by Arvie Eldred, superintendent of schools of the city of Troy, against William H. Weick, head teacher of the commercial department in the Troy High School. He was served with such charges and notified to attend a hearing thereon before the board of education on May 25, 1916. Such charges are based upon the general inefficiency of the appellant in the performance of his duties as the head of such commercial department. It is specified in the charges that the work of the appellant in his department has not been satisfactory, as shown by the results obtained in Regents examinations in subjects taught in such department, beginning with the month of June, 1911, and ending with the month of January, 1916, as compared with the average of results throughout the State. It is further specified that the classes instructed by the appellant in subjects in his department were instructed for a considerably longer time than that required, under Regents rules, for the preparation of pupils in such subjects.

Hearings upon such charges were had before the board of education, at which the appellant was represented by counsel. He was given a full and fair opportunity to defend such charges. The superintendent of schools and the principal of the High School testified at length as to the appellant's conduct of his department and as to the results of his work as shown by the

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examination of pupils. The appellant's attorney cross-examined the witnesses at great length, and the appellant himself testified in his own defense and presented expert testimony in respect to the conclusions which might be drawn from the results of examinations of pupils as shown in the specifications of charges. Upon the completion of the hearings, the board of education adopted a resolution, sustaining the charges as preferred and removing the appellant from his position as head of the commercial department of the Troy High School. This appeal is brought from such determination of the board.

The appellant is a duly licensed teacher, holding a New York State commercial teacher's certificate. He was appointed as head of the commercial department in the Troy High School by the board of education in February, 1908, and upon his completion of the probationary period of one year as provided by law, he was continued by the board in such position.

It is provided by section 245 of the Second Class Cities Law, as added by chapter 560 of the Laws of 1902, which act applies only to the cities of Albany and Troy, as follows: "All assistant teachers shall be appointed for a probationary period of one year, at the expiration of which term, unless satisfactory evidence of incompetency is submitted by the superintendent, the probationer may be elected by the board. Thereafter such teacher shall hold the position during good behavior and shall be removable only for cause, after a hearing, by the affirmative votes of a majority of the board."

It was the obvious purpose of this provision to give to the teacher elected as therein provided a permanent tenure of employment, subject to termination for a cause deemed sufficient by the board of education after a hearing before such board. The determination as to the sufficiency of the cause rests primarily with the board of education. There is a noticeable absence in the statute of a specification as to the nature of the cause justifying a removal. The teacher when permanently appointed is to hold his position "during good behavior," and the statute must be construed as

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permitting a removal for misbehavior or for any other cause which the board after a hearing finds to be sufficient.

The provision for removal for cause after a hearing is analogous to provisions contained in city charters relative to the dismissal of officers in police and fire departments, which usually provide for the preferment of written charges against such officers and for an examination and hearing before designated representatives of such departments. The decisions of the courts upon the review of dismissals of officers of such departments are very numerous. The Court of Appeals and the Appellate Divisions have definitely declared the rules controlling the disposition of such cases. It is probably true that the jurisdiction of the Commissioner of Education to review on appeal the dismissal or removal of teachers by local school authorities is broader and more extensive than that prescribed by statute where it is attempted to review by certiorari in the Supreme Court the judicial acts of a municipal board in respect to dismissals or removals of officers. The Commissioner of Education exercises a close and effective supervision over the administration of school affairs, and he may under certain special conditions direct the performance of acts by local school authorities without the same regard for judicial procedure as would be required where a remedy is sought for in the courts; but where under a statute provision is made especially for a judicial determination by a local board, based upon facts submitted to it in the course of a formal hearing or examination, it is appropriate to adopt and apply well established rules of judicial procedure in determining whether or not the board has exercised fairly and wisely the jurisdiction conferred upon it.

One of the established rules controlling the review by the courts of the dismissal of a public officer after a hearing in the nature of a trial, is that the finding or decision of the board or commission shall have the same effect substantially as the verdict of a jury, and that where proof has been presented in support of the charges and there is no considerable preponderance of proof against such finding or decision, it should not be disturbed. It was stated by the court in the case of *People ex rel. Brown v. Greene*, 106 App.

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Div. 230; *affd.*, 184 N. Y. 565, in a case involving the sufficiency of evidence to justify the dismissal of a member of the police force of the city of New York, that: "The holding of appellate courts in this State has uniformly been that the good of the service requires that a wide discretion should be vested in police commissioners and that their judgment and determination in a given case will not be disturbed unless there is an absence of evidence to sustain it. They being the statutory judges of offenses against the discipline and efficiency of the police force under their jurisdiction, their findings and determinations on the facts, when the evidence is conflicting and contradictory, should be regarded as conclusive when there is sufficient evidence, if believed, to sustain their determination."

In the case of *People ex rel. Schaefer v. Martin*, 28 App. Div. 73, 74, the court said: "It may be well once more to emphasize the rule that the judgment of the commissioners upon the conflicting testimony will not be reversed unless the preponderance of proof against their conclusion is so great as to warrant the belief that it was the result of passion, prejudice or mistake."

There seems to be a prevailing rule, deducible from the great number of removal cases decided by appellate courts, that where a hearing is had upon charges as provided by law, the conclusion reached should be accepted by the courts as presumptively correct and should not be disturbed on review unless it is convincingly established that there was an entire disregard of the weight of evidence in favor of the accused officer. It is my opinion that this rule should control the determination of an appeal brought from the conclusion of a board of education dismissing a teacher for incompetency or other cause under the statute above referred to.

The presumption will be that a board of education in the exercise of the power of removal thus conferred has reached its conclusion after due consideration of the evidence adduced in favor of the teacher, and with the purpose of protecting the interests of the schools of the city. The Commissioner of Education in reviewing such conclusion may not interpose safely his opinion as to the reliability of the testimony, and should not disturb the findings of

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the board where material evidence was presented in support thereof. He should not substitute his judgment for that of the board in determining whether the cause established by the evidence is sufficient to warrant the dismissal of the accused, where it appear that the conclusion reached was not the result of passion, prejudice or serious error.

An examination of the voluminous record containing the testimony produced at the trial does not disclose any prejudice or animosity toward the appellant by the superintendent of schools who preferred the charges or by the board of education. There is nothing to indicate that the board did not weigh carefully the evidence presented or that they did not have in mind the interests and welfare of the schools of the city when they considered the question of retaining the appellant in the position occupied by him. The charges against the appellant were general as to his inefficiency and specified particular instances showing his failure to succeed in the work required of him. There was considerable evidence submitted as to the results obtained in the subjects taught by the appellant upon Regents examinations, showing to the satisfaction of the board that they did not reach the standard maintained upon such examinations throughout the State. It also appeared that the appellant did not prepare his pupils for such examinations within the usual time required therefor. The board deemed this evidence sufficient to show the general inefficiency of this appellant in the work assigned to him. In connection with this evidence proof was submitted showing the appellant's failure to carry out suggestions or proposals in respect to the work of his department, made by the superintendent of schools after a conference attended by the appellant, the principal of the High School and the director of vocational education. The evidence pertaining to this conference was received under the objection of counsel for the appellant, who insisted that it was not within the scope of the charges. The admission of such evidence did not constitute error and it was proper to consider it in determining the question of the appellant's efficiency.

It is not advisable to declare a rule, to be universally applied,

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that the efficiency of a teacher is to be measured by results obtained upon Regents examinations in the subjects taught. Such results may, however, be considered as an element of the test to be applied in determining the value of the teachers' work. Such results if unfavorable, associated with other circumstances, may lead to the conclusion that the teacher is inefficient or incompetent. The evidence shows that the appellant's work was deemed unsatisfactory by his superior officer, and that he had failed to comply with suggestions made with due authority, modifying the plan and scope of his work. This failure, together with his inability to obtain desirable results in his department, gives a basis for the board's determination, and applying the rules hereinbefore referred to, it becomes necessary to sustain the board's action.

The appeal is dismissed.

In the Matter of the APPEAL FROM THE ELECTION OF THE DISTRICT SUPERINTENDENT OF SCHOOLS for the Fourth Supervisory District of Saratoga County

Case No. 356

(Decided January 24, 1917)

Under section 130 of the Town Law the town board may appoint a suitable person to fill a vacancy occurring in any town office on notice duly given.

On June 20, 1916, the school directors for the fourth supervisory district of Saratoga county convened in Hadley, N. Y., to elect a district superintendent of schools. This board consists of ten school directors. Nine attended and elected A. M. Hollister superintendent by a vote of five to four. The appellant, William J. Partridge, resides in and is an elector of the town of Edinburgh and claims to have been appointed to fill a vacancy caused by the resignation of Frank E. Eddy and that such meeting was held on June 17, 1916. No notice of any description was given to one of the justices of the said town and it appears that only two votes were cast in favor of the appointment of Mr. Partridge. He was not legally elected to fill the vacancy and hence could not legally participate in the school directors' meeting held on June 20, 1916.

Another question raised by the appellant is as to one of the school directors of the town of Day. *Held*, that the director legally chosen in

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that town was a Mr. Mosher who failed to qualify and Mr. Swears was subsequently appointed as school director of the town, and was, therefore, entitled to cast his vote for a district superintendent. *Held*, that A. M. Hollister, having received a majority of the votes cast at the meeting held June 20, 1916, was elected and is entitled to hold office as district superintendent in and for said district. Appeal dismissed.

Edgar T. Brackett, attorney for appellant.

S. M. Richards, attorney for respondent.

FINLEY, Commissioner.— On the 20th day of June, 1916, the board of school directors for the fourth supervisory district of Saratoga county convened at Hadley, N. Y., for the purpose of electing a district superintendent of schools, in accordance with the provisions of section 383 of the Education Law. There are five towns in such supervisory district and the board consists of ten school directors. Nine school directors took part in such meeting. Several ballots were taken and upon the final ballot A. M. Hollister received five of the nine votes cast and was declared elected.

The appellant, William J. Partridge, is a resident and elector of the town of Edinburgh. He alleges that on the seventeenth day of June, at a special meeting of the town board of said town, he was appointed a school director of such town to fill the vacancy caused by the resignation of Frank E. Eddy, and that having qualified he was entitled to be seated as a member of the board of school directors. The respondent asserts, and the facts are not seriously disputed, that the notice of the special meeting of the town board at which the appellant claims to have been appointed was given orally by the town clerk in the afternoon of the preceding day. No notice of any description was given to one of the justices of the peace of said town, who at the time was located temporarily at Ballston Spa, N. Y., and outside of the town in question. It further appears from the minutes of the town board that only two votes were cast in favor of the appointment of Mr. Partridge. It is provided by section 130 of the Town Law that when a vacancy shall occur in any town office the town board or a

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majority of them may, by an instrument under their hands and seals, appoint a suitable person to fill the vacancy. No instrument or other writing appears to have been executed as so required by the members of the town board, and a majority of the town board did not concur in the appointment of the appellant. He was not therefore legally elected to fill the vacancy in the office of school director of the town of Edinburgh, and was not entitled to take part in the meeting of the board of school directors, held on June 20, 1916.

The remaining question which is raised by the appellant relates to the validity of the election of Channing Swears as one of the school directors of the town of Day. It appears from the papers on appeal that at the general election held in 1915 two persons were nominated for the office of school director for said town upon the Republican ticket, and one upon the Democratic ticket. It is conceded that there was but one school director to be elected at such election, although it is evident from the allegation contained in the papers that the voters generally understood that two directors were to be chosen. At this election Channing Swears received eighty-five votes; W. J. Pettis, eighty-three votes; and P. L. Mosher, fifty-three votes, for the office of director. There being only one office to be filled, the votes cast for Mr. Swears and Mr. Pettis on the same ballot were void and should not have been counted for either of them. Under such ruling it is apparent that neither of them received more votes than those cast for Mr. Mosher, who was the only candidate for the office on the opposing ticket. The votes cast for Mr. Mosher were legal, and on the face of the returns he was elected to the office. He failed to qualify within the period of thirty days after the date of the election. Thereafter, in the month of February, 1916, at a meeting of the town board of the town of Day, Mr. Swears was appointed a school director of said town and qualified as such. He appears to have been appointed legally by the town board and was therefore entitled to act as director and to cast his vote for the election of a district superintendent.

It appearing that A. M. Hollister received a majority of votes cast by the duly qualified directors of the fourth supervisory dis-

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trict of Saratoga county, at the election held on June 20, 1916, he was duly elected and is entitled to hold office as district superintendent in and for said district.

The appeal is dismissed.

In the Matter of the Appeal from the ELECTION OF TRUSTEE at a Special District Meeting Held in District No. 3, Town of Geddes, Onondaga County, on the 17th Day of May, 1916

Case No. 358

(Decided February 20, 1916)

The election of a school district officer must be upon proper notice and by ballots — failure to observe these requirements will invalidate the election of district trustee.

The majority of the qualified electors of district No. 3, town of Geddes, Onondaga county, have appealed from the election of one Morgan Mathewson, as trustee, at a special meeting held May 17, 1916. After the passing of the time for the holding of the annual meeting, without any such meeting being held, Mathewson caused notice to be posted to the effect that the annual school meeting for such district would be held on the 17th day of May, 1916, at 7 o'clock P. M. The notice was not personally served upon the electors of the said district, being merely posted in six places in the district. Of the fifty qualified electors only three were present and participated in the meeting. No ballot was taken nor was a ballot-box provided, nor were inspectors of election nominated or appointed. *Held*, that the notice required should have been given personally at least six days before the time of the meeting. Election by ballot, appointment of inspectors are essential to a valid meeting, also a ballot-box must be provided. The failure to do this, together with the want of notice, is fatal and the election of Morgan Mathewson must be set aside. Appeal sustained.

George F. Park, attorney for appellants.

Wright, Scully & O'Brien, attorneys for respondent.

FINLEY, Commissioner.— This is an appeal by a substantial majority of the qualified electors of district No. 3, town of Geddes, Onondaga county, from the election of Morgan Mathewson as

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trustee at a special meeting held May 17, 1916. It appears that the time for holding the annual meeting in such district passed without such meeting being held; that thereupon Morgan Mathewson, the trustee, caused a notice to be posted to the effect that the annual school meeting for said district would be held on the 17th day of May, 1916, at 7 o'clock P. M., to transact the usual business of an annual meeting. The notice of such meeting was not served personally on the electors of said district as is required for the holding of a special district meeting, but was posted in six places in the district. It further appears that about fifty qualified electors reside in the district and that of this number but three were present and participated in the meeting. It is established by the evidence adduced that the meeting was called shortly before 7 o'clock; that no ballot was taken for the election of trustee; that no ballot-box was provided; and that no inspectors of election were nominated or appointed.

The respondent Mathewson was the trustee of the district for the school year 1915-1916. It became his duty as such trustee, when the time for the holding of the annual meeting had passed without such meeting being held, to call a special meeting for the purpose of transacting the business of the annual meeting. Notice of such special meeting should have been given at least six days before the time of the meeting, by personal service of the copy of the notice upon each elector residing in the district. The failure to give notice of such meeting by personal service was not wilful or fraudulent, but it is apparent that many electors failed to attend the meeting because they did not know that it was to be held.

The law provides that the election of all district officers shall be by ballot and that inspectors shall be appointed who shall canvass the votes cast and announce the result of the ballot. A suitable ballot-box must also be provided. These formalities which safeguard the election of school district officers were not observed, and, taken together with the failure to give sufficient notice of the meeting, render it necessary to set aside the election of the trustee at such meeting as illegal and void.

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It is insisted by the respondent that this appeal should be dismissed because it was not brought within thirty days after the date of such special meeting in accordance with the rules of practice on appeals. The records of the Department disclose that a petition was filed by residents of the district on June 1, 1916, which questioned the legality of this district meeting and requested an investigation. The petition was not in proper form so that it could be considered as an appeal, but it should be regarded as an attempt upon the part of the petitioners to bring the matter to the attention of the Commissioner within the time prescribed by the rules of practice. Thereafter a formal petition was presented, and it thereupon became my duty to entertain and determine the same as an appeal.

The appeal is sustained.

It is hereby ordered: That the election of trustee at the special district meeting held in district No. 3, town of Geddes, Onondaga county, on the 17th day of May, 1915, be and the same hereby is vacated and annulled. The clerk of said district is hereby required forthwith to call a special meeting of the district for the purpose of electing a trustee who shall serve for the balance of the present school year.

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In the Matter of Construing SECTION 94 OF THE RAILROAD LAW and SECTION 141 OF THE HIGHWAY LAW, as Amended by Chapter 83 of the Laws of 1912, in Reference to Railroad Grade Crossings

(Opinion dated December 13, 1916)

Expenses of eliminating a grade crossing upon a county highway, liability of how changed by chapter 83 of the Laws of 1912.

The town in which a grade crossing is eliminated upon a county highway, which was constructed prior to the enactment of chapter 83 of the Laws of 1912, is still liable for 15 per cent of the expenses of such elimination; but towns are no longer liable for any portion of the expenses connected with such eliminations upon county highways which have been constructed since such act took effect.

Hon. Edwin Duffey, State Commissioner of Highways, submitted an inquiry as follows:

“Are the towns still liable to contribute towards the expense of eliminating railroad grade crossings upon county highways since the enactment of chapter 83 of the Laws of 1912?”

WOODBURY, Attorney-General.— On the 5th day of May, 1912, the Public Service Commission, Second District, was petitioned for the alteration in the manner in which the highway known as the Voorheesville-New Salem County Highway, No. 984, in the town of New Scotland, Albany county, crossed the tracks of the West Shore Railroad Company (leased and operated by the New York Central and Hudson River Railroad Company), pursuant to the provisions of section 91 of the Railroad Law.

The petition was granted on the 26th day of August, 1913, and the work was then proceeded with and finally completed in November, 1915. The entire cost amounted to the sum of \$36,618.36 and half of such expense was paid on the basis of the State paying 50 per cent, the county 35 per cent and the town of New Scotland

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15 per cent thereof; the railroad company paying the other one-half of the cost.

County Highway No. 948 was constructed prior to the 2d day of April, 1912, but the petition for, and all the work connected with the elimination of such grade crossing, was subsequent thereto.

It is now claimed by the board of supervisors of Albany county that it is entitled to a refund from the State of the sum of \$1,373.19, representing 15 per cent of one-half of the actual cost of such elimination.

It is provided by section 94 of the Railroad Law, in part, as follows: "Whenever under the provisions of sections ninety and ninety-one of this chapter a highway is constructed across an existing railroad and is a part of a state or county highway constructed or improved as provided in the highway law, one-half of the expense of making such crossing above or below grade or changing or rebuilding the existing structure by which such crossing is made, shall be paid by the railroad corporation, and the remaining one-half of such expense shall be paid by the state in the case of a state highway, and jointly by the state, county and town in the case of a county highway, in the same proportion and in the same manner as the cost of construction or improvement of such state or county highway is paid."

Since April 2, 1912, the above section has been twice amended. The first amendment, chapter 378 of the Laws of 1914, made a change in the subdivision above quoted, and the amendment made by chapter 240 of the Laws of 1915 was a general amendment of the section, but made no change in the above quoted portion of such section. Neither amendment made any change in the method of apportioning the expenses for an elimination of a grade crossing.

Prior to April 2, 1912, the expense of constructing a county highway was borne by the State, county and town in the following manner: The State paid 50 per cent, the county 35 per cent and the town 15 per cent. By chapter 83 of the Laws of 1912, which took effect April 2, 1912, it was provided that thereafter the cost of construction of such county highways should be borne jointly

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by the State and county, the State to pay 65 per cent and the county 35 per cent, and the town was eliminated from further liability to pay any portion of such costs.

If the provisions of the Railroad Law relating to the town's liability to contribute to the expense of altering railroad crossings upon county highways which were constructed under the law as it stood prior to April 2, 1912, were changed by the amendment of the Highway Law above referred to, there is conflict and repugnancy between the two statutes, but it would seem that if the Legislature intended to change the Railroad Law with reference to the apportionment of the expenses for the elimination of grade crossings upon such county highways which were constructed before, as well as those constructed after the act of 1912, we would find some amendment of the Railroad Law which would clearly indicate such intent and not leave the change to inference or implication which is worked out through an amendment to an entirely different statute. There has been no change in the phraseology of section 94 of the Railroad Law so far as it provides for contribution by the towns. It provides that the expense of elimination of crossings of the character of the one at Voorheesville is to be paid for jointly by the State, county and *town*, "in the same proportion and in the same manner as the cost of the construction or improvement of such State or county highway is paid," but it is claimed that this provision so far as it applies to a town was wholly repealed by implication by the enactment of chapter 83 of the Laws of 1912.

Repeals by implication are not favored by the courts and will not be declared except upon the clearest manifestation of such an intent on the part of the Legislature. *Grimmer v. Tenement House Dept.*, 204 N. Y. 370; *City of New York v. Trustees*, 85 App. Div. 355; *Matter of Tiffany*, 179 N. Y. 455; *People v. Ward*, 91 id. 616.

These two statutes relate entirely to different classes of work, one to the construction of State and county highways and the other to the alteration and elimination of railroad crossings upon such highways. The inconsistency which is claimed to exist arises out of the fact that the Railroad Law after providing that one-half

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the expenses of elimination shall be State, county and *town* charges, directs that it shall be paid in the same proportion by the respective municipalities as provided by the Highway Law for the construction of such highways, and when we turn to the Highway Law as amended in 1912, we find that no part of the expense can be charged upon the town since April second of that year.

“If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted.” *Matter of Tiffany*, 179 N. Y. 457. It seems to me by construing the Railroad Law as still applicable to the distribution of the expenses for such eliminations as they were apportioned before the enactment of chapter 83 of the Laws of 1912, upon all county highways which were constructed under the law as it stood prior to that date, and that the towns are only eliminated from contribution for such expenses on all roads constructed under the statute as it has existed since that date, that effect can be given to both statutes and both can be upheld. If they are so repugnant that both cannot be sustained, then the provisions of chapter 83 so far as it eliminates the town from contribution for such work, will have to be regarded as inoperative, since the enactment of chapter 378 of the Laws of 1914, for section 94 of the Railroad Law has been twice amended as hereinbefore stated, since chapter 83 was passed and by both amendments the liability of the town has been continued. It is equally well settled that where repugnancy exists in different statutes, to such an extent that they cannot be reconciled, then the later or more recent statute shall prevail over the former, as the later law is presumed to express the last intention of the Legislature. I do not think, however, that it is necessary that either act should be construed as repealed, but that both should be given effect in their respective fields of operation.

Again, I am informed that since the enactment of chapter 83 of the Laws of 1912, both the Highway Department and the Public Service Commission have treated the provisions of the Railroad Law with reference to the distribution of the expenses of elimination of railroad grade crossings, as still in force as to the town's

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liability upon all roads constructed under the law as it existed before the 2d day of April, 1912, and have, on several occasions made distribution of such expenses upon county highways constructed under the law as it stood prior to such date, in precisely the same way they did before the passage of chapter 83. While the interpretation of those two commissions is not absolutely controlling, still their action is entitled to great weight upon a subject involving doubt as to the proper construction to be placed upon these statutes.

“The practical construction of a statute by those for whom the law was enacted, or by public officers whose duty it is to enforce it, acquiesced in by all for a long period of time, is of great importance in its interpretation in a case of serious ambiguity.” *Grimmer v. Tenement House Dept.*, 205 N. Y. 549, and cases cited; *People ex rel. Werner v. Prendergast*, 206 id. 411; *Easton v. Pickersgill*, 55 id. 310.

It was held by Attorney-General Carmody in an opinion under date of April 25, 1912 (Report of 1912, p. 230), that a town would remain liable for its proportion of the cost of construction of all county highways where the liability had become fixed prior to the 2d day of April, 1912, and the same ruling was again made by Mr. Carmody in an opinion in report of 1912, at page 234. It was held in the latter opinion that the act of 1912 was not intended to act retroactively and that in all cases where plans and appropriations had been made before April 2, 1912, for the construction of county highways, the cost of such construction should be apportioned between the State, county and town in accordance with the provisions of section 141 of the Highway Law as it stood prior to the enactment thereof by chapter 83. I am in full accord with both of such opinions, but neither related to the distribution of expenses connected with the elimination of grade crossings upon a county highway.

By leaving the word “town” in section 94 of the Railroad Law in the two amendments which have been made thereto since the enactment of the 1912 law, the intent of the Legislature to continue the town’s liability for expenses connected with the elimination of grade crossings upon all county highways which were

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constructed under the law as it existed prior to April 2, 1912, is clearly indicated. If it were intended that the State and county alone should pay the one-half of the expenses of all eliminations after the passage of chapter 83, then the word "towns" contained therein is not only useless but confusing. On the contrary, if the Legislature intended that the costs of such elimination should be paid by the State, county and town, or by the State and county alone, in the same manner as the costs of construction were originally paid, it was necessary to continue the word "town" in the statute when it was amended. By this construction, the two statutes are harmonized; both are given force and effect, and no repeal by implication is required. It is apparent that the Legislature intended to eliminate the town from contribution for both construction and elimination expenses after April 2, 1912, and I think it is also quite apparent that it intended to continue the liability of towns to contribute its 15 per cent of the expenses for elimination of all grade crossings on county highways which were constructed before that date.

While this subject is not entirely clear of all doubt, I am forced to the conclusion that the towns are still liable for 15 per cent of the cost of all eliminations of grade crossings upon county highways which were constructed under the law as it stood prior to April 2, 1912, but are not liable for any portion of the expenses of elimination of grade crossings upon such county highways as have been constructed under the law as it has existed since that date.

**In the Matter of CONSTRUING THE CANAL LAW, SUBDIVISION 13
OF SECTION 33, Relative to Cutting Ice on State Canals**

(Opinion dated December 19, 1916)

Circumstances under which the Superintendent of Public Works may legally exact compensation.

Subdivision 13, section 33 of the Canal Law, authorizing the Superintendent of Public Works to issue permits on such terms as he may deem advantageous to the State to any person to cut ice from State canals, applies to ice found on the artificial canals of the State, and to

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the artificial works connected therewith, such as reservoirs, feeders, etc., but has no application to ice found on the navigable rivers of the State which have merely been canalized under the Barge canal improvement.

Hon. William W. Wotherspoon, State Superintendent of Public Works, submitted an inquiry as to whether, since the canalization of portions of the Mohawk and Hudson rivers, under subdivision 13 of section 33 of the Canal Law, in view of the fact that the improvement of the Hudson and Mohawk rivers has been accomplished not only by deepening the same, and, in some localities by raising the pool elevation by means of dams, thus providing a greater area of water than the natural water area, and that at every point on the canalized rivers some improvement has been made which has changed the natural conditions, he has authority to issue permits and exact compensation as a condition of permitting persons to harvest ice therefrom and to exact compensation for cutting ice on said canalized rivers in the following class of cases:

1. Where the river channel has been deepened without appropriation by the State of any land on either side of the river.
2. Where by the appropriation of land on either side of the river the State itself becomes the riparian owner and its land must be crossed to reach the river.
3. Where the elevation of the river has been raised by the construction of dams and the areas of the water vastly increased, the State acquiring flowage rights on either shore.
4. Where the sole improvement to the river has been deepening of its bed but no appropriation has been made of land on either side of the stream nor any increase in the surface area.

WOODBURY, Attorney-General.—Broadly speaking I am of the opinion that the application of subdivision 13, section 33 of the Canal Law is limited to the artificial canals of the State and to the works connected therewith such as reservoirs, feeders, etc., and has no application to ice formed on the canalized Hudson and Mohawk rivers.

In determining the rights of the State in the premises two fundamental rules must be borne in mind.

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First, the general rule is well settled that on non-navigable rivers, at least, the right to harvest ice is in the owner of the bed thereof.

In 40 Cyc. 844 the rule is laid down that

"Ice forming upon water belongs to the owner of the soil beneath the water."

"A riparian proprietor is the owner of the ice which forms over that portion of the bed of the stream which he owns and has the right to cut and sell it. * * *."

In 29 Cyc. 331 the rule is laid down that

"The owner of the soil under the water is ordinarily the sole and exclusive owner of the ice forming upon such water and the riparian ownership of the bed of a stream carries with it the right to the ice forming upon that surface as far as the riparian right to the soil extends. * * *."

In *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 224; *affd.*, 169 N. Y. 60, the court says: "The owners of the waters of a mill pond own the ice formed upon it. The owner of the bed of a stream owns the ice within it (*Myer v. Whitaker*, 55 How. Pr. 376; *Swan v. Goff*, 39 App. Div. 95) * * *."

The same rule is laid down in *Valentino v. Schantz*, 216 N. Y. 1, where it is said: "A riparian owner above a mill dam has the fixed and well-defined right to take ice from the stream where it flows over his land. The owners of the mill dam cannot avail themselves of such right, notwithstanding the fact that their action may be said to have rendered its exercise possible."

Applying this rule it was held in *Green Island Ice Co. v. Norton*, 105 App. Div. 331; *affd.*, 198 N. Y. 529, that the State being the owner of the fee of the bed of the Mohawk basin it was competent for the legislature to restrict the right to take ice therefrom to persons obtaining permission so to do from the Superintendent of Public Works.

"If (says the court) the ice belongs to the owner of the fee where it is formed, then the ice in question here belongs to the State. 'Lands appropriated by the canal authorities for the use of the canal, under the statute, are held by the State in fee.'"

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(Sweet v. City of Syracuse, 129 N. Y. 316, 334; Heacock & Berry v. State of New York, 105 id. 248.)

“It seems to me that the control that the State has over the canals and their waters is different from that which it exercises over the navigable waters of the State. The one it exercises by right of sovereignty, and ‘among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable rivers or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water.’ (Smith v. City of Rochester, 92 N. Y. 463, 477.)

“In the case of its canals, as we have seen, it owns the fee of the land beneath the waters and the strip of land on each side; it owns it as it owns its public buildings, and while that ownership is for the benefit of the people, and one in which the people have an interest, that interest is a collective, not a several interest, not an interest which permits any one of the people by right of first appropriation to take a portion thereof and reduce it to private ownership.”

It will be observed that the court clearly distinguishes between the rights of the State in its canal proper and in its navigable waterways canalized.

The same distinction is pointed out in Gould on Waters (3d ed. § 191) where it is said that: “When the State appropriates the fee of land for the construction of canals, the former owner has no right to take ice therefrom; but if the canal is simply a servitude the owner of the fee is entitled to take the ice when its removal does not interfere with the navigation or the use of the waters for hydraulic purposes.”

A reading of the communication of the Superintendent of Public Works presenting this inquiry discloses that, in the main, the State has, in the exercise of its reserved sovereign right, and without any appropriation, merely entered upon and improved the navigation of these navigable streams.

Such action did not, in my opinion, serve to divest riparian owners of any riparian rights, or the public of any rights which

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they possessed in these waters prior to the State's entry. If prior thereto they possessed the right to cut ice thereon the mere fact that the State has seen fit to enter upon and make use of the streams for canal purposes, and accordingly to alter the natural conditions to meet the needs of navigation, does not divest them of those rights.

Riparian owners on these rivers whose title extends to the thread of the stream would seem under the rule heretofore stated (in the absence of the exercise by the State of the power of eminent domain, depriving them of the right), entitled to harvest ice formed on the water within their property lines.

In *Williams v. City of Utica*, 217 N. Y. 162, it was held that the patent therein involved, because of the peculiar language employed, carried title to the bed of the Mohawk river; but in the more recent case of *Danes v. State*, 219 N. Y. 67, the Court of Appeals reiterates the general rule that the title to the beds of the Mohawk and Hudson rivers above, as well as below the influence of the tide, is in the State.

I think it may fairly be laid down as a general rule, permitting of but few exceptions, that the State holds fee title to the beds of the Mohawk and Hudson rivers, but it holds this title not as a proprietor but as a sovereign in trust for the people.

As stated in *Rosemiller v. State*, 58 L. R. A. (Wis.) 93, 98: "Wherever the title to the beds of navigable waters is in the State for public purposes, all the incidents of public waters at common law exist, and that they include the public right of taking ice to the same extent as the right of taking fish, etc."

The rule is stated in 29 Cyc. 331 as follows: "In the absence of a statute to the contrary, where the State owns the bed of a stream, the right to cut ice thereon is a common right of the public, where there is no interference with any other person to a like enjoyment, subject only to such mere police regulations as the legislature may prescribe to preserve the common right. Subject to such rules, one person has the same right to the ice formed upon public waters as has another until there has been an actual appropriation of such ice. The State is not the owner of ice formed on public waters, and has no right to sell it. The limit of

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State authority to interfere with the taking of ice from public waters is the making of regulations which will preserve the common right to do so."

In *Slingerland v. International Contracting Co.*, 43 App. Div. 215, 224; *affd.*, 169 N. Y. 60, the court says: "The State owns the Hudson river in trust for the use of the public. Apart from the statute about to be considered (referring to the statutes now embodied in Art. XVI of the General Business Law), the ice formed upon it, like the fish within it, becomes the property of the captor who first peacefully seizes it."

The opinion of the Court of Appeals in the same case (169 N. Y. 60, 72) states that: "The Hudson river being a navigable stream, the ice formed therein belongs to the first appropriator and the right to take it is one owned in common with the public; except as an exclusive privilege is conferred by the statute upon the owners, or lessees, of ice houses on the river of cutting and gathering the ice formed in the waters adjacent to their lands, upon compliance with certain conditions. (Chap. 953, Laws of 1895; chap. 388, Laws of 1879.)"

In *American Ice Co. v. Catskill Cement Co.*, 43 Misc. Rep. 221, 226, the court says, speaking of the Hudson river, that: "It has been the law of this State until the legislature otherwise decreed (By Chap. 953, Laws of 1895 and Chap. 264, Laws of 1899) that this ice was common property and belonged to the first appropriator." See also *Briggs v. Knickerbocker Ice Co.*, 11 Misc. Rep. 197.

The New York cases cited had to do with the Hudson, a river navigable in law as well as in fact; but the authorities appear to apply the rule there laid down to rivers navigable in fact but not in law (such as the Mohawk, and the Hudson above tide water), the title to which is held by the State as a sovereign in trust for the public, and to hold that: "The right of every person within the State to enjoy its public waters for every legitimate purpose, including the cutting and appropriation of ice, which does not wrongfully interfere with the right of any other person to like enjoyment, subject only to such mere police regulations as the legislature may in its wisdom prescribe to preserve the common

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heritage of all is a constitutional right of all persons within the State," and that the State possesses no such property right or interest in the waters of such stream or the ice formed therefrom as will permit it to sell the same. *Rosemiller v. State*, 58 L. R. A. (Wis.) 93.

The distinction in this respect between ice forming on canalized streams and on artificial canals is adverted to in the opinion of the court in *Green Island Ice Co. v. Norton*, *supra*. It lies in the different character of the State's ownership of the two things.

As to ice forming upon its public rivers which have merely been canalized, the only power possessed by the State is one of regulation.

So far as the Hudson is concerned, the upland owners possessing ice houses on the banks thereof are afforded a preferential right to the ice forming thereon by virtue of the provisions of article XVI of the General Business Law, which has been sustained by the courts only as an exercise of the State's power to *regulate* the taking or appropriation of the ice. *Slingerland v. International Contracting Co.*, 43 App. Div. 215; *affd.*, 169 N. Y. 60.

Applying these rules to the above enumerated situations:

1. The fact that the State has entered upon these rivers and merely canalized and deepened them (without making any appropriation) does not in my opinion operate to divest riparian owners or the public of their former rights to the ice formed thereon.

2. The fact that the State has appropriated or owns portions of the banks of these rivers has no bearing on the question of the right of the public or the riparian owners to cut ice thereon, the determining factors being that the rivers are public navigable rivers and, assuming that the State has any title to the bed, it is as a sovereign in trust for the public.

3. With respect to the situations enumerated in the third classification, I am informed that at certain points on the Hudson and Mohawk rivers the State has erected dams which cause the water to overflow the natural banks of the river and submerge large areas of natural upland to which the State has by appropriation or otherwise obtained the absolute fee title. Thus a large ice field has been created on and over land outside of the natural

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bed of the river, to which land the State owns the absolute fee title.

While the State has no title to the ice formed within the limits of the natural bed of these rivers, applying the rule laid down in *Green Island Ice Co. v. Norton, supra*, and other cases, I am persuaded that it has such a proprietary title to and interest in the ice formed on these artificial areas, without the limits of the natural bed, that it may sell or dispose of the same and that the aforesaid provisions of section 33 of the Canal Law apply to ice found on these areas.

4. Under the state of facts assumed in the fourth classification I think the State does not possess the right to sell the ice formed upon these rivers.

I have not considered it necessary and have not intended by the foregoing to express any opinion as to whether the riparian owners along these streams possess any rights in the ice formed thereon superior to the rights of the general public.

In the Matter of Construing the BUSINESS CORPORATIONS LAW,
the TRANSPORTATION CORPORATIONS LAW and the RAILROAD
LAW in Connection with the Powers of Business Corporations

(Opinion dated December 29, 1916)

The Secretary of State should not file a proposed certificate of corporation of an alleged business corporation, the declared object of which is to carry on a transportation business.

A certificate of incorporation should state concisely the objects for which the corporation is to be formed without any modifications or statements to the effect that the purposes and powers to be exercised by it are only those permitted under the provisions of the law under which they are incorporated so that any person dealing with it may know exactly the extent of its powers without the necessity of an opinion of the Attorney-General or the courts construing its powers and approving or disapproving the filing of such certificates by the Secretary of State.

The proposed objects which appear in the certificates of incorporation of the American Foreign Power Corporation and the Panama Electric Securities Corporation relative to the business of transportation and that

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of managing and controlling railroads are within the provisions of the Transportation Corporations Law and the Railroad Law. These appearing, they are in my opinion improper in the certificate of a business corporation and the Secretary of State is not required to file it until these objects are eliminated.

Hon. Francis M. Hugo, Secretary of State, submitted the following with a request for an opinion thereon.

There have been presented to the Secretary of State two proposed certificates of incorporation; one entitled "American Foreign Power Corporation;" and the other, "Panama Electric Securities Corporation." The objects of both corporations are practically the same.

The proposed certificates of incorporation of both of these corporations are so broad and sweeping that almost every kind of business may be conducted thereunder except the business of banking and insurance. There are fourteen paragraphs in the certificates containing the objects for which they are to be formed, but for the purposes of this opinion, paragraphs 1 and 2 of section second of the certificate of incorporation of the American Foreign Power Corporation and a portion of paragraph 2 of the certificate of incorporation of the Panama Electric Securities Corporation will be considered.

"I. To acquire, by purchase, subscription or otherwise, and to invest in, hold or dispose of bonds or other obligations or evidence of indebtedness of any individual, firm, association, government or sub-division thereof, and stocks, bonds, securities or other obligations or evidences of indebtedness of any other corporation or corporations, domestic or foreign, and to exchange therefor its stock, bonds or other obligations as well as any other of its property; and while owner of any such stocks, bonds, securities, evidences of indebtedness, or other obligations to exercise all the rights, powers and privileges of ownership, including the right to vote thereon for any and all purposes; to assist individuals, partnerships or other corporations engaged in any of the same general lines of business mentioned herein by subscribing to capital or otherwise; to aid by loan, subsidy, guaranty, or in any other man-

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ner whatsoever, any individual, firm, association, corporation or government whose stocks, bonds, securities or other obligations are in any manner held or guaranteed, and to do any and all other acts or things toward the preservation, protection, improvement or enhancement in value, of any such stocks, bonds, securities or other obligations, and to do all and any such acts or things designed to accomplish any such purpose, so far as may be permitted to corporations organized under the Business Corporations Law.

“ II. To buy or otherwise acquire, construct, sell or otherwise dispose of, lease, control, manage and operate water works, dams, reservoirs, buildings, plants, machinery, distributing systems, conduits, aqueducts, and every apparatus, accessory and convenience for supplying municipalities, corporations and individuals with water and water power for domestic, mechanical, irrigation, agricultural, public and fire, and any and all other purposes; to buy or otherwise acquire, construct, sell or otherwise dispose of, lease, control, manage and operate street, steam, electric or other railways or railroads with any kind of motive power (including parks, places of amusement and other usual and useful adjuncts to such properties and businesses); to construct, buy, hire or otherwise acquire, own, use, maintain, sell, lease or otherwise dispose of telephone and telegraph lines and systems; to manufacture, produce, generate, store, sell, distribute, or otherwise dispose of electricity, steam and gas (natural or artificial) and any other power or force, in any form, for light, heat and power and any other purposes for use and application for municipal, domestic, scientific, manufacturing, transportation, and any and all other purposes, public and private, to which the same can be applied; to buy or otherwise acquire, construct, build, sell or otherwise dispose of, lease, control, manufacture and operate plants, buildings, machinery, equipments, distributing systems and every accessory and convenience for conducting, maintaining and developing the manufacture, production, generation, storage, sale, distribution, disposition, use, regulation, control and application of the foregoing products for the purposes of light, heat, power, locomotion, transportation, telephone, telegraph and for all other purposes to which the same can be applied. All of the purposes

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and powers in this paragraph numbered II are to be exercised only without the State of New York and only to the extent permitted corporations organized under the Business Corporations Law of the State of New York, and are not to be construed to authorize the operation of a railroad in a foreign country."

WOODBURY, Attorney-General.—A certificate of incorporation should state concisely the objects for which it is to be formed without any modifications or statements to the effect that the purposes and powers to be exercised by it are only those permitted under the provisions of the law under which they are incorporated so that any person dealing with it may know exactly the extent of its powers without the necessity of an opinion of the Attorney-General or the courts construing its powers and approving or disapproving the filing of such certificates by the Secretary of State.

Section 2 of the Business Corporation Law provides: "Except as provided in section two-a of this chapter three or more persons may become a stock corporation for any lawful business purpose or purposes other than a moneyed corporation or a corporation provided for by the banking, the insurance, the railroad and the transportation corporations law."

That part of section 10 of the Transportation Law material is as follows: "Seven or more persons may become a corporation for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating or owning steam, sail or other boats, ships, vessels or other property to be used in any lawful business, trade, commerce, or navigation upon the ocean or any seas, sounds, lakes, rivers, canals or other water ways and for the carriage or storing of lading, freight, mails, property or passengers thereon."

Section 5 of the Railroad Law provides: "Fifteen or more persons may become a corporation, for the purpose (1) of building, maintaining and operating a railroad, or (2) of maintaining and operating a railroad already built, not owned by a railroad corporation, or for both purposes, or (3) of building, maintaining and operating a railroad for use by way of extension or branch or cut-off of any railroad then existing, or for shortening or straightening

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or improving the line or grade of such railroad or of any part thereof, by executing, acknowledging and filing a certificate, in which shall be stated:"

Section 29 of the Railroad Law (Laws of 1910, chap. 481, constituting Consol. Laws, chap. 49) provides: "A railroad corporation may be formed under this chapter for the purpose of constructing, maintaining and operating in any foreign country a railroad for public use in the transportation of persons and property, or for the purpose of maintaining and operating therein any railroad already constructed, in whole or in part, for the like public use, and of constructing, maintaining and operating, in connection therewith, telegraph lines and lines of steamboats or sailing vessels. Any corporation formed for the construction and operation of a railroad by stationary power, may construct, operate and maintain a railroad in any other state or country, if not in conflict with the laws thereof, but the assent of the inventors or patentees of the method of propulsion used must be first obtained in the same manner and to the same extent as would be necessary within the United States. The term "foreign" in this and the next section shall include Porto Rico."

In *Wilson v. Tennant*, 32 Misc. Rep. 273; aff. 61 App. Div. 100; 179 N. Y. 546, the court said at page 275: "The business corporation law (Chapter 691, Laws of 1892) provides that three or more persons may become a stock corporation for any lawful purpose or purposes other than a moneyed corporation or a corporation provided for by the banking, the insurance, the railroad and the transportation corporations laws."

A transportation corporation cannot be formed with less than seven members and a corporation desiring to maintain and operate a railroad requires fifteen or more persons to organize such a corporation. The requirements are entirely different for the organization of a corporation desiring to do a transportation or railroad business than that of a purely business corporation.

The provisions of a given statute providing for the incorporation of a company to do certain branches of business should not be construed so as to permit such corporation to do a business thereunder which is specially provided for in other statutes. A

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reference to the objects for which these two corporations are to be formed, embodied in the paragraphs above quoted, will show that they purpose to do all business that can consistently be done by a business corporation and in addition thereto to do the business of a transportation and railroad corporation. The certificates of these corporations after asserting their objects and purposes in language that cannot be misunderstood attempt to qualify or circumscribe their powers by saying "all of the purposes and powers in this paragraph numbered II are to be exercised only without the State of New York and only to the extent permitted corporations organized under the Business Corporations Law of the State of New York". The qualification above quoted to the effect that said proposed corporations will exercise the powers mentioned in paragraph II without the State, which powers I have construed to include those belonging to transportation and railroad corporations, is of no consequence. Our laws for the creation of corporations are liberal enough without sanctioning the filing of a corporate charter with powers therein contained which it is prohibited from exercising in this State.

All the powers stated in a proposed charter should be such as may be exercised by the kind of corporation being formed.

If such a certificate were permitted to be filed, the corporation would start such business with the sanction of the State, and its powers then could only be curtailed by resorting to the courts to determine whether in fact such corporation was conducting its business within the prescribed provisions of the Business Corporations Law.

It is asserted in substance in the brief of the eminent counsel for the incorporators, that if the general laws mentioned (banking, insurance, railroad, etc.) do not expressly authorize the corporation to be organized for a given lawful purpose, under that particular law, in such a case a corporation may be formed under the provisions of the Business Corporations Law. This as a general proposition may have some force, but in these particular cases it does not, for the purposes as expressed in the proposed

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charters specifically transgress the objects provided for by statute for a transportation corporation and a railroad corporation.

It was held in an opinion by the Attorney General that a corporation could not be organized under the Business Corporations Law to engage in the business of operating, chartering and letting scows, barges, tugs and vessels of all kinds and descriptions in the general freight lighterage business inland, coastwise and international for such objects are provided for in the Transportation Corporations Law and are limited to corporations incorporated thereunder. Attorney General's Report, 1913, vol. 2, p. 73.

It was also held in an opinion of the Attorney General the same year and same volume at pages 115 and 118, "Section 2 of the Business Corporations Law provides that a corporation may be organized to carry on any lawful business purposes, but not for the purposes provided for under the Transportation Corporations Law." This rule applies with equal force to the organization of a corporation desiring to lease, control, manage and operate street, steam, electric or other railways or railroads with any kind of motor power. The proposed objects which appear in the certificates of incorporation of these two companies relative to the business of transportation and that of managing and controlling railroads are within the provisions of the Transportation Corporations Law and Railroad Law. This appearing they are in my opinion improper in the certificate of a business corporation and the Secretary of State is not required to file it until these objects are eliminated.

In the Matter of Construing the MEANING OF THE WORD "SAVINGS" as used in the Federal Reserve Banking Act

(Opinion dated January 2, 1917)

The prohibition contained in section 279 of the State Banking Law against the use of the word "savings" is not in conflict with section 19 of the Federal Reserve Act.

In passing the Federal Reserve Act it was not the intention of Congress to authorize a national bank to do business as a savings bank and it did not intend to interfere with any safeguards for the small savings depositor

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which the State may have devised to protect him. The cases distinguish between a "saving bank business" and the business of receiving deposits in the form of savings accounts. It is the duty of the Attorney-General to sustain statutes of the State, such as section 297 of the Banking Law, unless he is convinced that such legislation is no longer of force. No sanction is found in the Federal Reserve Act for the use of the words "savings departments" by national banks in their business.

Hon. Eugene Lamb Richards, State Superintendent of Banks, submitted an inquiry as to whether section 279 of the State Banking Law is in conflict with section 19 of the Federal Reserve Act in that it may be said to be superseded by the congressional legislation.

WOODBURY, Attorney-General.—We have after careful consideration decided to hold that the Federal Reserve Banking Act does not authorize a national bank to use in its business the words "savings department." You are aware of course of the specific prohibition in section 279 of the State Banking Law against the use of the word "savings" by any bank other than a savings bank:

"No bank, national banking association, trust company, individual, partnership, unincorporated association or corporation other than a savings bank or a savings and loan association shall make use of the word 'saving' or 'savings' or its equivalent, in its banking business, or advertise or put forth any advertising literature or sign containing the word 'saving' or 'savings,' or its equivalent, nor shall any individual or corporation other than a savings bank in any way solicit or receive deposits as a savings bank. Any bank, national banking association, trust company, individual, partnership, unincorporated association or corporation violating this provision shall forfeit to the people of the state for every offense the sum of one hundred dollars for every day such offense shall be continued."

The question is whether the above provision is in conflict with section 19 of the Federal Reserve Act in that it may be said to be superseded by the congressional legislation.

Section 10 provides: "Demand deposits within the meaning

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of this act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days and all *savings accounts* and certificates of deposit which are subject to not less than thirty days notice before payment."

We cannot deny the right of national banks to receive deposits in the form of "savings accounts," but we feel quite certain that the above language does not empower such banks to do a "savings bank business" as that business has come to be generally understood throughout the country, and therefore we are of the view that the State statute (section 279 of the Banking Law) is still operative against the use of the word "savings" by any bank "other than a" savings bank.

National banks are in the first place commercial banks as distinguished from savings banks. The relationship between the savings depositor and the bank in the case of a national bank is that of debtor and creditor rather than that of trustee and *cestui que trust* as in a savings bank, and the funds in the latter instance are protected by stringent rules as to investment.

The words "savings banks" have accordingly come to have a special meaning to small savers as denoting this increased protection to their deposits, and they would be deceived by its use by other banks. As Congress did not, we believe, intend to authorize a national bank to do business as a "savings bank," so it did not intend to interfere with any safeguards for the small savings depositor which the State may have devised to protect him. You may consult generally the cases distinguishing between a "savings bank business" and the business of receiving deposits in the form of savings accounts. *People v. Binghamton Trust Co.*, 139 N. Y. 185; *Barrett v. Bloomfield Savings Institution*, 54 Atl. Rep. (N. J.) 543, 552; *State v. Peoples National Bank*, 70 id. (N. H.) 542.

It may be stated also that it is the duty of the Attorney-General to sustain State statutes such as section 297 of the Banking Law unless he is convinced that such legislation is no longer of force.

In conclusion section 19 of the Federal Reserve Act concerns itself only with the reserve necessary to protect different forms of deposits. No sanction is found therein for the use of the words "savings department" by national banks in their business.

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In the Matter of Construing SECTION 15 OF THE GENERAL CORPORATION LAW Relative to the Power of the State Highway Commission to Enter Into a Road Contract with a Foreign Corporation

(Opinion dated January 11, 1917)

The policy of the State is to keep foreign corporations from doing business without a license.

A State officer is not justified and would not be judicially upheld in inviting a foreign unlicensed corporation to enter into a contract in this State in face of the prohibition contained in section 15 of the General Corporation Law. When such a foreign corporation has deposited, with its proposal, a certified check under its special agreement with the State, the State Commission of Highways may retain the same, as the agreement itself is valid, even though permission to do business in this State has not been obtained.

The State Highway Commission submitted an inquiry based upon the fact that the Kennedy Construction Company which presented the lowest bid for the construction of State highway No. 5637, Washington county, is a foreign corporation organized in Canada, and requested an opinion as to the right of the State Highway Commission to enter into a contract with that corporation to construct a road.

WOODBURY, Attorney-General.—Kennedy Construction Company which presented the lowest bid for the construction of State highway No. 5637, Washington county, is a foreign corporation, organized in Canada. Such being the case I am of the opinion that the State Highway Commission is powerless to enter into a contract with that corporation to construct the road. Section 15 of the General Corporation Law provides:

“§ 15. Certificate of authority of a foreign corporation.—No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state,

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and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive * * *."

Since the above statute prohibits a corporation from doing business in this State without a certificate, no State officer can of course compel the corporation to violate the law. It is the policy of the State no matter what the penalty is for disobedience of that policy to keep foreign corporations from doing business here without a license. A State officer is not justified and would not be judicially upheld in inviting or forcing a foreign unlicensed corporation to enter into a contract in this State in face of the prohibition in section 15.

You state in addition that there already exists in this State a domestic corporation of the same name. The Kennedy Construction Company, of Canada, might change its name and apply for and receive permission to do business in this State, whereupon the contract might be let to it, but its action in changing its name and applying for permission to do business here cannot be forced and remains a matter entirely of its own concern and initiative.

However, you have a legal right to retain the check deposited by the corporation. The special agreement under which the check is held provides:

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“Accompanying this proposal is a draft or certified check for \$———. This money shall become the property of the State if, *in case this proposal shall be accepted* by the State through the State Commission of Highways, the undersigned shall *fail* to execute a contract with and furnish the surety required by the Commission within the time fixed in the ‘Information for Bidders’ hereto attached; otherwise the said draft or certified check is to be returned to the undersigned.

“On acceptance of this proposal for said work, the undersigned does or do hereby bind himself or themselves to enter into written contract, within ten days of date of notice of award, with the said State Commission of Highways, and to give the required bond and surety to perform said work for the consideration above named.”

Such an agreement once having been made by the corporation, is valid even though permission to do business in this State has not yet been obtained. *Wood v. Selick & Ball*, 190 N. Y. 217; *Maher v. Harrington Park Villa Sites*, 204 id. 231; *Bagdon v. Philadelphia & Reading Coal Co.*, 217 id. 432. These cases are authority for the proposition that although the entry into a contract within the State by a foreign corporation previous to a license to do business here, is prohibited by section 15 of the General Corporation Law, still the contract is not void, the only penalty being that the corporation cannot sue upon it. The State, if the road is not constructed by this corporation, will be put to all the expense to meet which the check was deposited, and as the special agreement is valid, it may be enforced by you. It was not at the time the proposal was made and is not now impossible for the corporation to obtain permission to do business in this State, so the corporation may as I view it under the terms of the special agreement, neglect or refuse to take those steps and may therefore “*fail*” to execute the contract for the construction of the road.

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In the Matter of AUTHORITY TO ISSUE STATE BONDS for the Purpose of Meeting the Expenses Incident to the Construction of the Prisons Now Under Consideration by the New Prisons Commissions in Excess of the Amounts Already Appropriated Therefor

(Opinion dated January 15, 1917)

No indebtedness shall be contracted in excess of money actually appropriated or legally available.

The act creating the Commission on New Prisons authorized that Commission to enter into contracts at a total maximum cost to the State, but the Legislature did not make full appropriations for meeting such contracts, nor had it authorized the issuance of any bonds nor the creation of any indebtedness beyond such appropriations.

Hon. Charles B. Hubbell, Chairman, Commission on New Prisons, submitted an inquiry as to whether there is any legal obstacle to issuing State bonds for the purpose of meeting the expenses incident to the construction of the prisons now under consideration by the New Prisons Commission in excess of the amounts already appropriated therefor.

WOODBURY, Attorney-General.—I am sorry to say that the State Finance Law, section 35, is an obstacle to the contracting of such an indebtedness without an appropriation or authorization. It provides as follow: "A state officer, employee, board, department or commission shall not contract indebtedness on behalf of the State, nor assume to bind the State in an amount in excess of money appropriated or otherwise lawfully available."

The act creating your Commission (Laws of 1916, chap. 594) authorized your Commission to enter into contracts at a total maximum cost to the State, but the legislature did not make full appropriation to meet such contracts, nor did it authorize the issuance of any bonds nor the creation of any indebtedness beyond such appropriations. On the contrary, you will note in sections 2 and 3 of such act that the legislature has specifically provided that contracts for such prison construction "shall provide that the State shall not be liable for any failure on the part of the legislature to appropriate sufficient money for the completion of the contract or contracts within the terms thereof."

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**In the Matter of Construing the PUBLIC HEALTH LAW, SECTION 6
as to the Power of the Governor to Issue an Order Based on
the Report of the State Commissioner of Health Into Alleged
Nuisances**

(Opinion dated January 17, 1917)

The extent of the authority of the Governor to issue an order based on a report made as provided under section 6 of the Public Health Law, herein outlined.

The Commissioner of Health of the State of New York, under direction of the Governor and pursuant to section 6 of the Public Health Law, made a report to the Governor of his findings and conclusions in the matter of the garbage disposal plant now in the course of erection on Staten Island, under contract with the city of New York.

In his report he found, among other things, that the transportation of garbage to the plant on Staten Island will be offensive to the residents of Staten Island living along the Kill von Kull and Arthur Kill, and will thereby constitute a nuisance, and that the operation of the proposed plant will also constitute a nuisance, but does not report an existing nuisance.

In the event the Governor approves and files this report in the office of the Secretary of State, he is without power at this time to issue the order mentioned in section 6 of the Public Health Law, directing the abatement and removal of the nuisance, for the reason that none exists to abate or remove.

Hon. Chas. S. Whitman, Governor, has submitted the report of the State Commissioner of Health which was made pursuant to his direction as provided in section 6 of the Public Health Law, requesting the Commissioner of Health to make a complete and thorough examination of the garbage disposal plant to be erected on Staten Island by the city of New York. In this report the Commissioner of Health has certified to the Governor as follows:

“1. The transportation of garbage to the site of the proposed plant and the operation of the plant at Lake Island will not affect in any material way the life or health of the inhabitants of Staten Island.

“2. The transportation of garbage in scows to the proposed plant as provided for in the contract at times and under certain

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conditions of atmosphere and transportation will be offensive to the residents of Staten Island living along the Kill von Kull and the Arthur Kill and will thereby constitute a nuisance.

“ 3. The operation of the proposed plant will disseminate objectionable odors at times and under certain atmospheric and operative conditions in the neighborhood of the proposed plant including the village of Linoleumville, the settlement known as Fresh Kills and other property located in the vicinity, and will thereby constitute a nuisance.”

The Governor asks for an opinion concerning his power to issue an order based on the report as provided under section 6 of the Public Health Law.

WOODBURY, Attorney-General.—On July 15, 1916, the Governor pursuant to section 6 of the Public Health Law, directed the State Commissioner of Health “to make a complete and thorough examination” of the garbage disposal plant to be erected on Staten Island by the city of New York and to report to the Governor as speedily as possible his findings and conclusions upon this matter.

Section 6 of the Public Health Law referred to in the mandate of the Governor, authorizes the State Commissioner of Health “* * * to make examinations into nuisances, or questions affecting the security of life and health in any locality. * * * report the results thereof to the governor * * *.”

The State Commissioner of Health has now made his report in which he certifies as quoted above.

Turning again to section 6 of the Public Health Law, it is provided: “* * * The report of every such examination, when approved by the governor, shall be filed in the office of the secretary of state, and the governor may declare the matters public nuisances, which may be found and certified in any such report *to be nuisances*, and may order them to be changed, abated or removed as he may direct * * *.”

It will be noted from reading the statute above quoted that the Governor is:

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(1) Authorized in his discretion to approve the report, and in that event it shall be filed in the office of the Secretary of State;

(2) May declare the matters to be nuisances which may be found and certified in any such report to be nuisances, and

(3) Order them to be changed, abated or removed as he may direct.

The Commissioner of Health in his report has not certified that there is any existing nuisance to abate. He does certify, however, that there will be a nuisance when the garbage is transported and the plant is in operation.

The only authority, if any, on the part of the Governor to issue an order declaring the transportation of garbage and the operation of the plant to be a nuisance is derived from the statute in question, but said statute does not in my opinion authorize the Governor to declare a matter to be a public nuisance that is not found and certified to be such. This is clear from the wording of the statute itself. It says: “* * * and the governor may declare the matters public nuisances, which may be found and certified in any such report *to be nuisances*, and may order them to be changed, abated or removed as he may direct * * *.”

It might be suggested that an order issue which would speak *in futuro*, and is, an order providing that when the acts which the Commissioner of Health reports will constitute a nuisance are carried into effect, that the district attorney, sheriff, etc., abate the same.

It is my opinion the Governor would not be authorized to issue any order at this time because the statute speaks of an existing nuisance. The existence of a nuisance is a condition precedent to the issuance of such an order.

I therefore conclude that the Governor is without power at this time to issue the order mentioned in section 6 of the Public Health Law, but is authorized if in his judgment that step should be proper, to approve the report, in which event it shall be filed in the office of the Secretary of State.

Attorney-General

**In the Matter of ADJUSTING THE PROCEEDS OF A FORECLOSURE
OF A LOAN OFFICE MORTGAGE Where They Are Insufficient to
Pay All Unpaid Taxes, Costs and Expenses of Foreclosure**

(Dated January 24, 1917)

**Costs awarded in action of foreclosure of deposit fund mortgages, how paid —
chapter 634, Laws of 1911.**

All costs, including expenses, taxed and collected in actions of foreclosure of United States deposit fund mortgages, should be paid into the State treasury, and an account kept thereof pursuant to section 37 of the State Finance Law, and if such proceeds are insufficient to pay all the costs and expenses of the action and the amount due on the mortgage debt, the deficiency should be borne by the trust funds.

Hon. Eugene M. Travis, State Comptroller, submitted the following inquiry together with a request for an opinion thereon.

“Where the proceeds arising out of the sale of lands upon the foreclosure of a loan office mortgage are insufficient to pay all unpaid taxes, costs and expenses of foreclosure, and the whole mortgage debt, should the costs allowed and taxed in said action be credited to the account of costs collected by the Attorney-General, and thus leave a deficiency in the trust funds, or should the whole amount of the proceeds, or so much thereof as may be necessary, be credited to the trust funds and leave a deficit in the cost account of the Attorney-General?”

WOODBURY, Attorney-General.—In July, 1916, an action was commenced in the Supreme Court, Wyoming county, in the name of the Comptroller as party plaintiff, and Egbert E. Woodbury, Attorney-General, as attorney for the plaintiff, for the purpose of foreclosing a mortgage executed by Martha Relyea and husband to the commissioners for loaning certain moneys of the United States, dated the 26th of March, 1867, and being United States deposit fund mortgage No. 483, upon land in Wyoming county. A judgment was duly entered in said action on September 21,

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1916, in favor of the plaintiff, for the sum of \$545.66, being the whole amount due and remaining unpaid upon such mortgage at the time of the entry of such judgment. The judgment directed a sale of the premises by the sheriff of the county of Wyoming and that the proceeds arising from such sale should be paid out in the following order:

First. That the sheriff retain the amount of his fees, not exceeding, however, the sum of fifty dollars.

Second. That he pay the advertising costs and other disbursements connected with the sale.

Third. That he pay any and all taxes that might be outstanding against the premises.

Fourth. That he next pay to the plaintiff the sum of \$118.09 adjudged as the taxable costs and disbursements of said action, and also the aforesaid sum of \$545.66, the amount found due upon the mortgage, with interest thereon from the date of said judgment.

Pursuant to such judgment the premises were thereafter sold at public auction for the sum of \$625.

Out of such purchase price there were paid three items

of taxes aggregating the sum of.....	\$25 91
Sheriff's fees and posting	17 00
Printing charges	15 00

Making a total of	\$57 91
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The balance of said proceeds, amounting to the sum of \$567.09, has been remitted by the sheriff to the Comptroller.

If the amount taxed as costs and expenses of the plaintiff's attorney, viz., \$118.09, is credited to the office of the Attorney-General as costs collected, it will be seen that there is a deficiency in the proceeds of sale amounting to the sum of \$96.66 to pay all items that stand against the funds, besides the interest which has accrued upon the damages since the sale.

The sole question involved in this inquiry is, which fund should suffer the loss occasioned by the insufficient amount of the proceeds

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arising from the sale of the premises to satisfy the several items of expenses and charges against them.

It is provided by section 88 of chapter 634 of the Laws of 1911, that whenever there is a default in the payment of principal or interest upon any United States deposit fund mortgage, the Comptroller shall cause the same to be foreclosed, whenever, in his judgment, it may be necessary or best for the protection of the interests of the State, and that all such actions or proceedings shall be prosecuted by the Attorney-General "in conformity with the practice in such case made and provided."

By section 89 of the same law, it is provided that the Comptroller shall pay over the surplus of any moneys which may remain after the payment of the amount due and to become due on the mortgage and the cost and expenses of the foreclosure, to the county treasurer of the county in which the land was located, and the residue of the proceeds arising from the sale after the retention by him of the costs, disbursements and expenses, to the State Treasury.

It was certainly intended by the Legislature that the land charged with an incumbrance of a deposit fund mortgage should be liable for not only the mortgage debt, but the costs and expenses incident to its foreclosure. By section 89, above referred to, it is clearly implied that all such costs and expenses are to be paid out of the proceeds arising from a sale under such a mortgage before any part of the proceeds are paid to the Treasurer, and if there is a deficiency in the funds after the payment of all costs and expenses, it will have to be borne by the trust funds from which the original loan was made.

The practice referred to in section 88 of chapter 634 of the Laws of 1911, which must be followed by the Attorney-General in the foreclosure of mortgages given to the commissioners for loaning certain moneys of the United States, is the practice laid down in the Code of Civil Procedure and the General Rules of Practice, and it is clearly the practice as outlined by the Code and Rules that the costs and expenses (including all taxes) shall be first paid from the proceeds and the balance applied to

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the payment of the mortgage debt. If it is insufficient, the mortgagee, or the funds from which the loan was made, must suffer the loss.

It is claimed by the Comptroller that inasmuch as the statute directs that all such mortgages shall be foreclosed by the Attorney-General, who is paid a salary by the State, no costs should be credited to his office, as costs collected, until after the full amount of the mortgage debt and interest has been paid, but there is no statute making such a provision. On the contrary, the statute directs that the Attorney-General shall prosecute and conduct such actions in conformity with the practice in such case made and provided. On account of the small amount for which the premises were sold there must be a shortage in either the trust funds from which the loan was made, or in the costs and expenses of making the sale. It is provided by section 37 of the State Finance Law, as amended by chapter 216 of the Laws of 1915, that every State officer, employee, board, department or commission receiving money for or on behalf of the State from fees, penalties, costs, fines, sales of property or otherwise, pay the same to the State Treasurer who shall keep an account thereof. Under this section all moneys received by the Attorney-General as costs are to be paid into the State Treasury whether such costs are awarded upon the foreclosure of a deposit fund mortgage or otherwise, and neither the Attorney-General, Comptroller or State Treasurer have any authority to divert such costs to any other fund.

And again, in every bill of costs there is included certain items of expenses and disbursements which are originally paid out of the general funds of the State in the foreclosure of United States deposit fund mortgages. If such costs are used to make up a deficit in the United States deposit funds after the proceeds arising out of the foreclosure proceedings are found insufficient, it would amount to a transference of funds, so far as such expenses and disbursements are concerned, from the general funds of the State to a trust fund without authority of law.

I am very clearly of the opinion that the item of \$118.09, costs and disbursements taxed and allowed in the above mentioned

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action, should be received by the State Treasurer and credited to the Attorney-General's office as costs collected and that the deficit should be borne by the trust funds from which the loan was made.

In the Matter of CONSTRUING THE VILLAGE LAW and the CHARTER OF THE VILLAGE OF LANCASTER as to Whether a Back Tax Collector Can Be Appointed Assessor

(Dated January 29, 1917)

Powers of village officers under special charter — how determined.

Under the special charter of the village of Lancaster the back tax collector is a village officer as is also the assessor. The same person cannot, therefore, fill both offices because of the provision of section 380, article 16 of the Village Law and the provisions of section 42 of the Village Law, which provides that a person shall not hold two village offices at the same time.

J. O. Garretsee, village president, Lancaster, N. Y., submitted an inquiry together with a request for an opinion on the following:

“Can a man who holds the office of back tax collector be appointed assessor?”

WOODBURY, Attorney-General.—In reply would state that section 2 of the charter of the village of Lancaster prescribes the qualifications of a person to hold office and in general is that he must be a resident and elector of said village, except in the case of a trustee, wherein further qualifications are set forth. The village of Lancaster is governed by a special charter and for the law upon questions not therein specifically mentioned, it is necessary to refer to the General Village Law for the reason that section 380 of article 16 of the Village Law directs that: “A village incorporated under and subject to a special law, and each officer thereof, possesses all the powers and is subject to all the liabilities and responsibilities conferred or imposed upon a village incorporated under this chapter, or upon an officer thereof, not inconsistent with such special law.”

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Section 42 of the Village Law prescribes the eligibility to office, and the last sentence thereof states: "A person shall not hold two village offices at the same time, except the offices of collector and police constable or water and light commissioner; and except that village trustees may also be water commissioners."

Under the special charter of the village of Lancaster a collector of back taxes is a village officer (tit. 9, § 10), as is also the assessor (tit. 3, § 1).

In accordance with the provisions of law which I have cited, I am of the opinion that a person cannot hold both offices of collector of back taxes and assessor.

In the Matter of CONSTRUING SECTION 49-E OF THE COUNTY LAW
as Amended by Chapter 379 of the Laws of 1913, Relative to
the Use of Almshouse Property in Connection with a Tuberculosis Hospital

(Dated January 31, 1917)

The intent of the Legislature in making these provisions.

Formerly there was no restriction whatever in the location of a tuberculosis hospital and in some instances the care and treatment of persons afflicted with tuberculosis went on in connection with the county almshouse. The intent of the law was to stop this practice so as to prevent the intermingling of people with tuberculosis and the inmates of an almshouse and to relieve the tuberculosis patient from the stigma of pauperism.

Dr. Lindsly R. Williams, Deputy Commissioner, Department of Health, submitted an inquiry, together with a request for an opinion thereon, as to whether or not a portion of the present almshouse farm in the county of Rensselaer can be used for the location of a tuberculosis hospital, pursuant to section 49-e of the County Law as amended by chapter 379 of the Laws of 1913.

WOODBURY, Attorney-General.—I am informed from a map submitted with your communication that the county farm consists

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of a tract of land of 145 acres located a short distance from the boundary of the city of Troy, and is divided by what is known as the Campbell highway. The county almshouse buildings occupy but a small area of this tract of land and are located on the west side of the Campbell highway.

Section 49-e of the County Law states: "No hospital authorized under the provisions of this chapter shall hereafter be located on the grounds of an almshouse."

Prior to this amendment there was no restriction whatever in the location of a tuberculosis hospital, and in some instances the care and treatment of persons suffering from tuberculosis existed in connection with the county almshouse. This amendment was intended to relieve such a situation. I infer that the intent of the law as expressed in such amendment was to separate the care, management and treatment of tuberculosis patients from the inmates of an almshouse, to prevent their intermingling and to relieve a tuberculosis patient from the stigma of pauperism.

The law fails to designate that a tuberculosis hospital must be located a certain distance from the almshouse buildings, and the only restriction is that such hospital shall not be located on the almshouse grounds. I am of the opinion that the term "grounds" as used in the statute means the immediate grounds or lands upon which the almshouse buildings are erected and does not mean all lands which may be used and cultivated and the products therefrom consumed at the almshouse, no matter how extensive an area such lands may cover.

Under such conditions I derive the conclusion that it is within the power and authority of the board of supervisors, by resolution duly adopted, to designate and set apart any portion of the lands of said county not immediately surrounding the almshouse buildings, to be used exclusively for the erection thereon and maintenance of a tuberculosis hospital.

Attorney-General

In the Matter of the PUBLICATION OF DETERMINATIONS AND STATEMENTS OF COUNTY BOARD OF CANVASSERS under the Election Law and the County Law

(Opinion dated February 1, 1917)

Definition of what constitutes the official canvass of the votes of a county — how published.

The Election Law, sections 432 to 439 inclusive, defines the powers and duties of the county board of supervisors. Section 22 of the County Law relates to the publication of election notices. The official canvass is the tabulated statement, by election districts, of all the votes of a county as prepared by the board of county canvassers, and should be published in the official newspapers designated pursuant to section 22 of the County Law, in addition to the determinations and statements mentioned in section 438 of the Election Law.

Dwight D. Corwin, Esq., county auditor, Suffolk county, submitted an inquiry as to what matters should be published pursuant to section 22 of the County Law and section 438 of the Election Law.

WOODBURY, Attorney-General.—The powers and duties of a county board of supervisors are defined under sections 432 and 439 inclusive of the Election Law. The proceedings of such board are therein declared, which include the determination of the number of votes for each candidate and for or against each proposition cast at such election based upon the statements received from the inspectors of election. The complete tabulation of the votes by election districts constitutes what is termed the "official canvass."

Upon the completion of the canvass, the board of county canvassers is directed to make separate statements of all the votes cast for each candidate, proposed constitutional amendment and proposition, for whom or upon which the voters of such county were entitled to vote (Election Law, § 437); also, upon the completion of the statements so required by section 437 of the Election Law,

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the board of canvassers shall determine which person has by the greatest number of votes been elected to the office of member of assembly and to each county office to be filled at such election and to the office of school commissioner, and also to determine whether any proposition or question submitted to the voters of such county only has been adopted or rejected. These determinations so reduced to writing are in effect the certificates of election issued to the successful candidate.

Section 438 of the Election Law directs that such determinations shall be filed in the office of the board of elections of such county, except that in the city of New York they shall be filed with the county clerk, and that certified copies of such determinations shall be prepared and transmitted to the respective persons therein declared to be elected.

Section 438 further provides that such determinations and the statements upon which they were based shall be published in accordance with the provisions of the Laws of 1892, chapter 686, sections 21 and 22, which said sections are now known as sections 21 and 22 of the County Law. Section 22 of the County Law relates to the publication of election notices issued by the Secretary of State and the official canvass and the designation of newspapers by the board of supervisors for the publication of the same, and is as follows:

“ Election notices and official canvass. Such boards, except in the counties of Erie and Kings, shall, in like manner, designate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the secretary of state, and the official canvass, and fix the compensation therefor, which shall be a county charge.”

The substance of this section first appeared in the law as subdivision 3 of section 7 of chapter 482 of the Laws of 1875. The words “ the election notices issued by the Secretary of State and the official canvass shall be published ” were contained in said act and were reincorporated in chapter 686 of the Laws of 1892. The law of 1875 was entitled “ An act to confer on boards of supervisors further powers of local legislation and administration and to regulate the compensation of supervisors.”

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I am informed that it is the attitude of the State Comptroller's office that section 22 of the County Law does not direct the publication of anything but that it merely provides for the designation of newspapers in which to print matter required by the Election Law to be published, and authorizes the board of supervisors to fix the compensation therefor. If the attitude of the State Comptroller were correct, the words "shall be published" and "official canvass" would be meaningless and such contention would be contrary to the general public understanding of said law from the time of its enactment for the reason that it has been the custom of boards of supervisors throughout the State to publish the tabulated statement, by election districts, of the board of county canvassers ever since the enactment of the statute wherein the words "official canvass" appear.

The sole purpose of publication is to inform and enlighten the people so as to enable them to acquaint themselves with the acts and doings of public officials and of matters of public interest generally. The mere publication of the determinations and statements directed by section 438 of the Election Law would be of no particular benefit to the people for the reason that the matter therein contained is usually published in the newspapers immediately following an election as a news item. The publication of the tabulated statement by election districts of all the votes cast is enlightening and educational and gives the person who desires to keep himself in touch and acquainted with the affairs of the public an opportunity to observe the result of an election in detail.

There seems to be no question but that the "official canvass" consists of a complete tabulation of all the votes cast, by election districts, properly summarized.

Section 439 of the Election Law states that: "* * * on or before the fifteenth day of December in each year a certified tabulated statement of the official canvass of the votes cast in each such county by election districts for candidates for governor, * * *" shall be transmitted to the Secretary of State by the board of elections of each county, except in the city of New York wherein such statement shall be transmitted by the county clerk;

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and also in a county wholly situated within the city of New York, “* * * the county clerk thereof shall file with the city clerk of such city a certified copy of the official canvass of the votes cast in such county or portion thereof by election districts for such city office, and such canvass by election districts shall, as soon as possible thereafter, be published in the City Record.”

Also section 437 of the Election Law states that: “Upon the completion by a county board of canvassers of the canvass of votes * * * they shall make separate statements thereof.”

Therefore by the language of sections 437 and 439 of the Election Law it is clearly evident that the term “official canvass” should be defined as a tabulated statement of all the votes cast by election districts.

The statements prepared under and in pursuance of section 437 and the determination mentioned in section 438 (which are based upon said statements) are not a part of the official canvass but are matters based upon and derived from the official canvass for the reason that the statute states such statements and determinations are to be prepared “upon the completion by a county board of canvassers of the canvass of votes.” Election Law, § 437.

I am therefore of the opinion that section 22 of the County Law is not limited by the provisions in the Election Law as to the publication of election matters, but that it is mandatory in its directions relative to the official canvass, and that such canvass, which is the tabulation of all the votes of the county by election districts, should be published in addition to the publication of the determinations and statements mentioned in section 438 of the Election Law.

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**In the Matter of INTESTATE ESTATES IN NEW YORK AND OTHER
COUNTIES Within the City of New York**

(Dated February 9, 1917)

Under what circumstances New York city is the custodian of personal property falling to the State upon the failure of next of kin.

Trusteeship of the city for the State as to such funds—when the corpus of the property should be paid over to the State Treasurer.

Balances of intestate estates remaining in the hands of the city chamberlain of New York city for twenty years should be turned over to the State Treasurer. Upon failure of next of kin the State and not the city succeeds to personal property of intestates.

Until failure of kin is established such funds are held in trust both by the city and by the State, and so while in the possession or custody of the city such funds cannot be charged off and applied to the purpose of reducing taxation.

Hon. William A. Prendergast, Comptroller of the City of New York, submitted an inquiry based upon the following statement of facts, with the request for an opinion thereon.

“On August 31, 1916, there stood upon the fund ledgers and upon the registers of intestate estates of the department of finance of the city of New York to the credit of an account entitled ‘T-11 Intestate Estates, County of New York \$592,048.40,’ and to the credit of the account entitled ‘T-13 Intestate Estates, County of Queens \$365.79.’ It is estimated that these estates number approximately 33,000. Some of them date back as far as the year 1840. For the reason that the accounts are so numerous and the increase therein so rapid during recent years, the city of New York contemplates transferring the moneys paid into these accounts prior to August 1, 1910, to the general fund of the city and applied to the reduction of taxation. This means that the city of New York will take \$483,680.99 from the intestate estates, county of New York, and \$167.33 from the intestate estates, county of Queens, and devote the moneys to its own use without restitution to such intestate funds.”

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WOODBURY, Attorney-General.—I am unable to find any authority conferred upon the city of New York to decree itself the owner of any portion of the funds referred to.

Personal property of intestates dying without known next of kin, or any distributive share of an intestate estate belonging to a person unknown, is required by law, applicable to most counties of the State, to be turned into the State Treasury for the benefit of persons who may thereafter appear to be entitled thereto. Code Civ. Pro. § 2740. When there are next of kin but their whereabouts cannot be found, the moneys are paid to the county treasurer. Code Civ. Pro. § 2741. If unclaimed for twenty years, the county treasurer pays them over to the Treasurer of the State. State Finance Law, § 44. The same provisions of law apply to an intestate estate administered by the county treasurer as public administrator.

The disposal of residues of intestate estates administered by a public official is somewhat different in New York county, under special statute. Chapter 230 of the Laws of 1898 directs the appointment by the surrogate of the county of New York of a public administrator who shall upon the settlement of his accounts by the surrogate, pay the balance of funds in his hands belonging to any intestate estate into the treasury of the city.

“ 14. The balance of any money in his hands on the adjustment of his accounts, *whether payable to persons unknown, or if known, whose places of residence are unknown, shall be paid immediately into the treasury of the city*, and he shall transfer and deliver to the corporation of said city all public stocks, stocks and bonds of any incorporated company, and other securities belonging to the estate of the deceased, if any there be, in his hands remaining unsold.”

Sections 16 and 17 of the act of 1898 provide for certain duties of the public administrator with respect to estates with a residue of less than \$250. Such residues “ *if not claimed* ” or “ *belonging to unknown persons or persons whose places of residence are unknown* ” are also paid into the city treasury. In other words, in New York county all balances of intestate estates administered by

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the public administrator go into the city [county] treasury. In other counties only shares of persons whose *whereabouts is unknown* go to the county treasurer, the shares of persons unknown go to the State Treasurer. Before the amendments to the Code of 1914 relative to Surrogates' Courts, county treasurers as public administrators paid all balances of intestate estates to the State Treasurer.

From the portions of the statute of 1898 above referred to, it is apparent that the intestate funds paid into the city treasury by the public administrator of New York county are of identically the same nature as intestate funds in other counties paid to the State Treasurer if next of kin are unknown (Code Civ. Pro. § 2740) and to the county treasurers, if there are next of kin but their whereabouts is unknown. Code Civ. Pro. § 2741. Such funds while on deposit either in the hands of the State Treasurer or in the hands of a county treasurer or the chamberlain of the city of New York belong to the next of kin of the intestate, and provision is made for their payment out to such persons *by order of the court* when such persons appear. Code Civ. Pro. §§ 2740–2741; Laws of 1898, chap. 230, §§ 16, 17. The title of the State to such moneys by so-called escheat is always conditional on the nonappearance of the rightful claimants, and so such moneys constantly remain funds under the control of the court or *court funds*. *People ex rel. Evans v. Chapin*, 101 N. Y. 682; *People v. Keenan*, 110 App. Div. 537, 540; *affd.*, 185 N. Y. 600.

Assuming with reference to any particular intestate estate, that the fact has once been established that there are no next of kin, the fundamental principle is that the State is the owner of all the personal property of the intestate. The State may reserve such funds to itself, or it may turn them over to a subdivision of the State in which they were collected, or the State may release its right to such property to persons who have a moral claim upon the funds. As was said in *Johnston v. Spicer*, 107 N. Y. 196, 201: “* * * we assume it to be the law in this State that all rights of property, of whatever nature they may be, revert to the People when the owner dies intestate, and there is a failure

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of heirs or next of kin, to take such property. We believe it to be the established rule in all civilized countries that, in such cases, the property of a resident dying intestate without heirs, reverts to the Sovereign or State, to be administered for the general benefit of the community in which he dies. While there is an absence of specific statutory authority declaring the rights of the State in such property, it is believed to be the uniform practice for it to assume by force of natural law, the control of such property, and to administer it for the benefit of those concerned, and, in the absence of any legal heir, to appropriate the proceeds to the uses of the State.

“It is said, in 4 Kent’s Commentaries, 425, ‘It is a principle which lies at the foundation of the right of property that if the ownership becomes vacant, the right must necessarily subside into the whole community in whom it was originally vested when society first assumed the elements of order and subordination.’

* * * With reference to the personal estate of persons dying intestate without next of kin, it appears to have been the uniform practice of the State since its organization to take such property, and hold it either for the benefit of the community at large or some division of the State, or to be returned to such persons as may from considerations of natural justice and equity seem to the legislature to be entitled thereto.”

In that class of intestate estates in New York county in which it has not yet been established that there are no next of kin, the balances in the city treasury still belong to the next of kin. Neither the city nor the State has any title thereto, and neither can proceed to exercise ownership thereover. In that class of cases where it has been established that there are in fact no next of kin, the State, as we have already shown, and not the city, succeeds to the property by so-called escheat.

So far then as the city of New York may claim any rights in intestate funds in its possession, the question presented is, has the State donated to the city of New York that portion of the intestate funds in the city treasury which have fallen to State ownership?

Nowhere in the act of 1898 or elsewhere is there any indication

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that the city has been bequeathed such funds. Indeed the statute of 1898 (§ 28), as did its predecessor provision, contained in the Revised Statutes (R. S. pt. II, tit. VI, art. I, § 41), indicates that the county of New York like all other counties is performing all duties with respect to intestate estates merely as agent for the sovereign State and not in its municipal corporate capacity. *Gunnison v. Board of Education*, 176 N. Y. 11; *County of Albany v. Hooker*, 204 id. 1; *Wadsworth v. Board of Supervisors*, 217 id. 484. For instance, both statutes provide that for certain neglects of the public administrator of the county of New York "he shall forfeit five hundred dollars to be recovered by the Attorney-General, for the use of the state."

Furthermore the personal property, or equitable right thereto, involved in the case of *Johnston v. Spicer*, 107 N. Y. 185, was personal property *in the county of New York*. The court refers to the public administrator statute applicable to that county and to the duty of the public administrator to pay funds into the city treasury (p. 200), and states that the property of intestates administered by the public administrator escheated to the State upon failure of next of kin. There is no suggestion by the court that the city of New York has become the owner under the statute of 1898.

We conclude that the moneys in possession of the city of New York under the provisions of the statute of 1898 and earlier statutes are moneys paid into court. Some portion of these moneys may belong to the State. No portion thereof belongs to the city. The chamberlain of the city should have turned over and should now turn over to the State Treasurer all sums which have remained in his hands for twenty years pursuant to the direction to that effect contained in section 44 of the State Finance Law:

"§ 44. *When money paid into court to be paid to state treasurer.*—Whenever any sum of money, paid into court, shall have remained in the hands of any county treasurer, or of the chamberlain of the city of New York, for the period of twenty years, it shall be paid over by such officer with all accumulations of interest thereon, after deducting his legal fees, to the treasurer of the state

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of New York. The said treasurer shall pay such sum to the owner or owners thereof upon the presentation to him of the warrant of the comptroller therefor. The comptroller shall draw his warrant for such sum upon the presentation to him of an order of the court made in accordance with section seven hundred and fifty-one of the code of civil procedure and upon due notice to said comptroller."

The above section is quite broad enough to cover moneys paid into court by the public administrator of New York county. Enacted first by chapter 651, Laws of 1892, it appeared in connection with certain amendments to the Code relative to moneys paid into court, but was not enacted as an amendment to the Code presumably because its application was intended to be broader than the application of the sections of the Code and was to include all moneys paid into court whether under the provisions of the Code or by direction of any other statute. The provision found its way into the State Finance Law in the consolidation of 1909. At the time of the enactment of the substance of section 44 of the State Finance Law, by the statute of 1892, the Consolidation Act of the city of New York (Laws of 1882, chap. 410, §§ 215-249) and amendments thereto covered the duties of the public administrator, which so far as this discussion is concerned were the same as those appearing later in the statute of 1898.

Additional support for our conclusion that these intestate funds in the hands of the city chamberlain are court funds and should be turned over to the State Treasurer, is found in section 754 of the Code, also in Throop's Code of 1877, which enacts that the provisions of the Code relative to moneys paid into court (including Surrogate's Court funds, Code, § 2669) shall apply to the chamberlain of the city of New York:

"§ 754. These provisions applicable in New York to the chamberlain. Each provision of this title, relating to a county treasurer, applies to the chamberlain of the city of New York, *with respect to money paid into court, in an action triable in the city and county of New York, or with respect to money, or a bond, mortgage or other security, or public stock, representing money*

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paid into court; except where special provision, with respect to the same, is otherwise made by law."

I may add that I am unable to comprehend why these moneys were not considered court funds and demand made for their payment to the State Treasurer in 1906 under the order in the case of *People v. Keenan*, 110 App. Div. 537; *affd.*, 185 N. Y. 600, which directed that the city chamberlain forthwith pay over to the Treasurer of the State any and all sums of money heretofore paid into court in the counties of New York, Kings and Richmond which have remained (unclaimed) for twenty years.

Authority to exercise acts of ownership over balances in these intestate funds, which the city purports to find in section 237 of its charter, does not exist. That section sanctions only the transfer of *unexpended appropriations* from one city fund to another. Intestate funds are held in trust and have not been raised or appropriated by the city; and could not be appropriated by the city for the reason as we have said, that they are trust property for unknown next of kin and revert to the State eventually if no next of kin are found.

The city is of the impression that its only duty in connection with intestate funds is to retain in such accounts sufficient sums to pay any claim which may be established against them, and that the remainder belongs to the city. In the first place we do not see how the amount of possible claims can be ascertained in view of the fact that there is no limitation upon the time within which claims may be presented, and, secondly, the Legislature, conceding it has the power, has not yet authorized the State Treasurer, much less the city of New York, to assume governmental ownership of intestate funds by charging off balances remaining in the accounts.

The city of New York should turn over to the State Treasurer balances of "intestate estates" from New York, Kings, Queens and Richmond counties which have remained in the hands of the chamberlain for twenty years.

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In the Matter of the LIMITATIONS OF AUTHORITY IN THE STATE HOSPITAL COMMISSION or Other Public Officers to Allow the Withdrawal of a Bid by a Contractor.

(Dated February 15, 1917)

Where a contractor is responsible no State officer can legally permit him to withdraw his bid or return to him a certified check.

There is no authority vested in the State Hospital Commission or other State officers to allow a contractor to withdraw his bid and have his certified check returned on account of having made a mistake in making his bid.

The State Hospital Commission submitted a request for an opinion as to whether in the case of a responsible bidder there was any authority for the Commission to allow him to withdraw his bid and have his certified check returned on the grounds of mistake as to his figures.

WOODBURY, Attorney-General.— W. F. Martin & Co. were the lowest bidders for the construction of an addition to the Livingston building at the Rochester State Hospital. Said company filed with their bid a certified check to the amount of \$850 and now ask to be relieved from entering into a contract for such work as they claim to have made a mistake in the computation upon which the bid was based, and also claim that their bid of \$16,383 was \$3,058 less than it would have been if no error had been made in the computation.

The company has shown very clearly that a mistake was made, and, while it would give me great pleasure to advise you that you have the authority to allow them to withdraw their bid and surrender to them the check of \$850, I cannot do so without reversing several former rulings which have been made by this Department and running counter to the statute. It was held by Attorney-General O'Malley (Report of 1910, p. 609) that, strictly speaking, neither the State Architect or the Commissioner in Lunacy had

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the right to allow the lowest bid if made by a responsible bidder, to be withdrawn and check returned. In that particular case he held that in consideration of the financial condition of the bidder, and the time required by him for the completion of the work, and the imperative necessity of the completion of the building at an early date, the Commission would have the right under the general reservation "to reject any and all bids" to reject that particular bid if the Commission was satisfied that such action would be for the best interests of the State. There is nothing in the papers before me to indicate that these bidders are irresponsible or that any other sufficient reason exists for the rejection of the bid except to do a favor to the contractors.

A very similar condition arose in 1911, when it was claimed by Collins Bros. that they had made a mistake of \$8,000 in making their estimate for the construction of two cottages at Valatie and they asked to have the above amount added to their bid. Attorney-General Carmody, in report of 1911, at page 660, advised the Superintendent of Prisons, as follows:

"The lowest bidders have asked to have added to their bid eight thousand dollars, giving as a reason that they made a mistake in making up the estimate, *i. e.*, instead of doubling the mason work on the cottages they included only the mason work for one cottage.

"The bid, upon its face, complies in all respects with the conditions of the proposal. It is a legal bid which the Superintendent of Prisons has a right to accept, and with which he may require compliance.

"Under no circumstances has the Superintendent the right to add to the bid of Collins Brothers as requested. He does have the right, however, if he deems it to the best interest of the State, to reject all bids and return the deposits to the respective bidders.

"If he resolves this question against rejection, then, under the circumstances here presented, it is my opinion that he would not be justified in rejecting this bid, but should notify the bidders of its acceptance and request execution of the contract."

I fully concur with the opinion of my predecessors. Under date

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of February 7, 1916, I advised the State Architect that the Ford Company, which claimed that an error had been made in its proposal, could not be allowed to withdraw its bid. To adopt any other rule would lead to endless trouble and annoyance, for every contractor who should find, after he had made his bid, that it would not be advantageous or profitable, or that he had under-estimated the cost of the work, would be importuning the Commission for relief and it would frequently be found difficult to distinguish between honest and dishonest representations. The only safe and legal course to pursue is to hold a contractor to his own figures and unless the best interests of the State would be promoted by a rejection of the bid, to compel him to carry out the contract which he has made or suffer a forfeiture of his check.

The courts have frequently relieved parties from the consequences of their mutual mistakes,—and it was held in *Harper Inc. v. City of Newburgh*, 159 App. Div. 695, that a court of equity had the power to rescind a contract for the mistake of one party only,—but I do not know of any authority vested in the administrative and executive officers of the State to consent to a rescision of a contract by allowing a bid to be withdrawn in the awarding of contracts to the lowest responsible bidders unless the best interests of the State would justify such course.

I do not doubt the genuineness of the representations made by W. F. Martin & Co. and I appreciate that by a refusal to allow them to withdraw their bid they will incur a loss of either the certified check of \$850, or a still greater loss in the fulfillment of their contract, but to grant the relief asked for will involve the expense of a readvertisement, delay in the work, the probability of a considerable increase in the contract price, and a violation of the plain mandate of the statute.

I do, therefore, advise you that the contract should be tendered to W. F. Martin & Co. at the figures named in its proposal, and if they should decline to execute the same, that their check be declared forfeited and new bids asked for.

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EDUCATION LAW, ARTICLE 12 — ELECTION LAW, SECTIONS 139, 319 — TOWN LAW, SECTION 170, as to Certain Fees and Expenses of Town Clerk

(Dated October 16, 1916)

Town clerk's expenses for postage — compensation for services required by the Election Law — how reimbursed for expenses.

In the absence of special statute, a town clerk in a town having an assessed valuation of less than \$5,000,000 is not entitled to be reimbursed for expenses for postage.

A town clerk is entitled to a reasonable compensation for his services in carrying out the provisions of the Election Law, to be fixed by the other members of the town board.

Although the statute is silent on the subject of expenses incurred by a town clerk in connection with services required by the Election Law, it is believed the members of the town board should consider the same in fixing the compensation and allow a sum which will compensate for both services and expenses.

J. E. Vickery, town clerk, Scotia, N. Y., submitted a statement of fact and inquiries based thereon as follows:

“The town of Glenville, Schenectady county, N. Y., is a town having a population of more than 5,000 and an assessed valuation of less than \$5,000,000,

“(1) If, in the discharge of my official duties, I am obliged to expend moneys for postage, is the amount so expended a charge against the town?

“(2) If the town board persists in refusing to fix my compensation for services required under the Election Law, am I entitled to a per diem compensation?

“(3) When engaged in the duty of delivering primary and election supplies am I entitled to transportation charges?”

TRAVIS, Comptroller.— That nothing is a legal charge against a town unless it be made so by statute, is an elementary proposi-

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tion of law. We may also assume, as is said by McQuillin in his work on Municipal Corporations, volume 2, page 1136, that "Generally speaking, a municipal corporation will not be liable for expenses incurred by its officers and employees unless they were duly authorized and made in the manner prescribed by law."

In determining what are municipal charges, the practice or custom prevailing counts for nothing. The question presented must be determined by an examination of the statutes. *Matter of Rogowski v. Brill*, 74 Misc. Rep. 472. It is incumbent upon the person presenting a claim against a town to point out the statute which makes it a charge against the town. *Morrison v. Town*, 89 Hun, 52; *Matter of Town of Hempstead*, 36 App. Div. 337.

I can find no statute and have been referred to none which expressly, or by necessary implication, makes the expense of postage incurred by the town clerk a charge upon the town generally. On the contrary, I find that subdivision 2 of section 170 of the Town Law, as amended in 1914, provides that in certain towns the town board may authorize such an expense to be a town charge. Glenville is not such a town. Under the familiar rule that the inclusion of one is the exclusion of another, I am constrained to believe that in the town of Glenville postage expenses incurred by the town clerk are not legal charges against the town.

There is at least one exception to this rule. Article 12 of the Education Law imposes thirteen separate and distinct duties upon the town clerk, and by section 341 of that act his necessary expenses and disbursements are made a charge against the town. If, therefore, in the performance of the duties imposed upon him by article 12 of the Education Law, the town clerk actually and necessarily expends any sum for postage, he is entitled to reimbursement from the town.

It may be that other provisions of law, not known to me, applicable to specific duties imposed upon town clerks, also contain similar provisions. Therefore, my answer to inquiry No. 1 is in

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the negative, unless a provision of law be found authorizing the expense to be charged against the town.

Concerning the second inquiry, section 139 of the Election Law reads in part as follows: "The town clerk of each town shall be paid by such town a reasonable compensation for his services in carrying out the provisions of this chapter, to be fixed by the other members of the town board."

No time is fixed within which the town board must so fix the compensation of the town clerk. It may be and quite likely is true that the town board can act more intelligently in fixing such compensation after the services have been performed. The town clerk will risk nothing by performing the services without his compensation therefor having been first fixed, because the law provides that he shall be entitled to "a reasonable compensation."

If the town board neglects to fix the compensation within a reasonable length of time, it may be compelled to do so by mandamus.

It is believed to be the duty of the town clerk to keep accurate account of all services rendered by him pursuant to the Election Law, and, if the town board does not sooner fix his compensation therefor, he may present an itemized account to the town board at the meeting held on Thursday preceding the annual meeting of the board of supervisors. His account should contain a statement of the several services performed and a reasonable charge therefor.

Should the town board then neglect or refuse to fix his compensation at a reasonable amount, or to audit the claims presented, the clerk will have an appropriate remedy either by mandamus, certiorari, or, under certain conditions, a suit at law.

Quite likely the per diem compensation of the town clerk will afford some guide in determining "a reasonable compensation" to be allowed to him. I do not believe, however, that the per diem rate is necessarily the basis for recovery.

I therefore answer the second inquiry in the negative and add that the town clerk will be entitled to "a reasonable compensation" whether or not the town board has fixed it.

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Respecting the third inquiry, that which has already been said in answer to the first is to a very great extent applicable.

The statute is silent on the subject of the expenses of the town clerk. I am of the opinion that when the Legislature used the words "a reasonable compensation" in section 319 of the Election Law, it had in mind the obligations imposed upon the town clerk by that act and intended that the town board would allow him such a sum as would compensate him for the time spent as well as the expenses incurred.

Therefore, in answering this inquiry, I say that the clerk should furnish the town board with information concerning the amount expended in performing his duties under the Election Law, and that the town board should consider that as one of the elements in fixing his compensation for services under that act.

TOWN LAW, SECTION 85, as to Justices of the Peace and Their Compensation

(Dated October 23, 1916)

Mileage when on town business not allowed to justices in certain towns.

Justices of the peace are not entitled to mileage when transacting business for the town, but, in towns having a population of 5,000 or more and an assessed valuation of more than \$5,000,000, may be reimbursed for traveling expenses.

Alonzo Smith, justice of the peace, Wallkill, N. Y., submitted an inquiry as to whether a justice of the peace of a town in Ulster county having a population of less than 5,000 is entitled to mileage "when transacting business for the town."

TRAVIS, Comptroller.—A town is a municipal corporation. It is an elementary principle of law that nothing is a charge against a municipal corporation unless it be made so by statute. McQuillin in his work on Municipal Corporations, volume 2, at page 1136,

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says: "Generally speaking a municipal corporation will not be liable for expenses incurred by its officers and employees unless they were duly authorized and made in the manner prescribed by law."

It was held in *Morrison v. Town*, 89 Hun, 52, and in *Matter of Town of Hempstead*, 36 App. Div. 337, that it is incumbent upon the person presenting a claim against a town to make clear that it is in all respects a legal charge and authorized by some statute. I can find no law and have been referred to none which expressly or by necessary implication fixes or allows to a justice of the peace or to any other town officer a rate of mileage to be allowed and paid for traveling on official business. Neither is there, so far as I can find, any provision of law which authorizes the payment of expenses necessarily incurred by town officers, other than the town superintendent of highways and the health officer, while traveling in the transaction of the business of the town in towns having a population of less than 5,000 and an assessed valuation of less than \$5,000,000.

The rule is however different as to towns having a population of more than 5,000 and an assessed valuation of more than \$5,000,000, as will appear from subdivision 2 of section 170 of the Town Law, as amended in 1914. In towns of that class the town board of the town may authorize as expenses of the town, "the actual and necessary expenses of such town officers for vehicles hired, traveling expenses, office work, janitor service, light, heat, telephone, furniture, stationery or supplies."

The compensation of a justice of the peace is fixed by section 85 of the Town Law at two dollars per day for each day actually and necessarily devoted to the service of the town except that boards of supervisors may fix a higher rate of compensation not exceeding four dollars per day. The compensation so provided by or pursuant to section 85 of the Town Law is intended, I believe, to cover all expenses incurred in the performance of official duties except in the class of larger towns already mentioned.

On April 20, 1911, the Attorney-General in a written opinion held that supervisors and justices of the peace are not entitled to

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mileage for attendance at meetings of the town board. That opinion, I believe, is controlling in this case. I, therefore, answer the inquiry in the negative.

**TOWN LAW, SECTIONS 98, 133 —Audits by Town Boards and
Boards of Town Auditors**

(Dated October 31, 1916)

Payment of claims against the town board upon certificates of audit.

Sections 98 and 133 of the Town Law are controlling, and there is no authority to the clerk of the board of supervisors to draw and sign orders on the various supervisors of the several towns of the county for the payment of all town charges upon the audit of the town board of auditors.

F. W. Hamer, clerk of the board of supervisors, Lacona, Oswego county, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

“In a certain county the custom has prevailed for many years for the clerk of the board of supervisors to draw and sign orders on the various supervisors of the different towns of the county for the payment of all town charges as audited by the board of auditors of the several towns thereby entailing a large amount of additional work for the clerk of the board of supervisors to perform.”

TRAVIS, Comptroller.—Is the procedure described in the statement of facts legal and if not, what is the correct procedure?

Under the provisions of the Town Law there is no difference relative to the procedure to be followed after the audit of accounts or claims by a board of town auditors from that which should be followed after the audit of accounts or claims against the town by the town board.

Section 133 of the Town Law provides for a meeting of the town board for auditing purposes. The time of meeting, manner of presentation of claims, special restrictions relative to claims, etc.,

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are set forth. Then the following excerpt therefrom outlines the procedure to be followed after action has been taken by the board.

"If any account is wholly rejected, the board shall make a certificate to that effect, signed by at least a majority of them, and file the same in the office of the town clerk. If the account is allowed, wholly or in part, the board shall make a certificate to that effect, signed by at least a majority of them, and if allowed only in part they shall state in the certificate the items or parts of items allowed, and the items or parts of items rejected, and shall cause a duplicate of every certificate allowing an account, wholly or in part, to be made. One of which duplicates shall be delivered to the town clerk of the town to be kept on file for the inspection of any of the inhabitants of the town; and the other shall be delivered to the supervisor of the town to be by him laid before the board of supervisors of the county at their annual meeting. The board of supervisors shall cause to be levied and raised upon the town the amount specified in the certificate in the same manner as they are directed to levy and raise other town charges."

It is a well-settled principle of law that the statute which limits a thing to be done in a particular form implies a negative. In other words, when specific direction is prescribed, it shall not be done otherwise. It has also been held that where the law fixes one mode of payment, it excludes all others. *Barber v. Town of Oswegatchie*, 10 N. Y. Supp. 834.

The Town Law provides, as heretofore indicated, that for each claim audited a separate certificate shall be issued by the town board in duplicate. One of these certificates of audit shall be filed with the town clerk as a public record, subject to the inspection of any person interested and the other shall be filed with the supervisor and constitute a basis for tax levy and payment.

The moneys levied by the board of supervisors for the payment of town charges are required to be paid by the town collectors to the supervisors of the several towns. Under section 98 of the Town Law the supervisor of each town is required to receive and disburse all moneys raised therein for defraying town charges, except those raised for the support of the poor. The statute is

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silent as to the exact method to be followed by the supervisor in paying the town claims. He may issue his check as supervisor payable at the bank where the deposit of town funds is made, or he may issue scrip payable at a date after taxes have been collected. When the latter plan is followed, the board of supervisors may, by appropriate resolutions, authorize the various collectors to accept such scrip and apply the same to the payment of taxes.

I therefore conclude that the practice described in the statement of facts is without warrant in law and that recourse must be had for proper procedure to sections 98 and 133 of the Town Law and logical deductions to be drawn therefrom.

In the Matter of PREPARING ASSESSMENT ROLLS as Provided by
the Tax Law, Sections 20 and 39

(Dated November 2, 1916)

Method of ascertaining assessments — number of hours constituting a day's work.

Assessors are permitted under the amendment to the Tax Law passed in 1916, to begin the preparation of assessment-rolls at any time after January first. The statute does not specify the number of hours constituting a day's work for town officers.

Edgar L. Lewis, Supervisor, town of Huntington, Suffolk county, submitted a statement of facts and inquiries based thereon as follows:

“ The assessors in the town of Huntington, Suffolk county, have completed the assessment-roll of 1916 and have filed same in the office of the town clerk. The terms of office of the assessors, except one elected for four years, expire on April 1, 1917.

“ *First.* Have the assessors any authority to begin the preparation of the assessment-roll for 1917 before April 1, 1917? In other words, have the assessors any work to do until after April first next?

“ *Second.* How many hours constitute a day entitling any town officer to charge for a day's work? ”

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TRAVIS, Comptroller.—In answering the first inquiry, I call attention to section 20 of the Tax Law, as amended in 1916, which is in part as follows: "*Ascertaining facts for assessment.* The assessors in each tax district shall annually, between January first and July first, ascertain by diligent inquiry all the property and the names of all the persons taxable therein."

Formerly assessors had no authority to begin work until May first, but, as will be observed, the date has been changed and work may now be started at any time after January first.

For a specific reply to the inquiry, my answer is that assessors not only may begin work on the 1917 assessment-rolls immediately after January first, but, because of conditions in Suffolk county, ought to begin work as soon thereafter as practicable. Section 39 of the Tax Law requires the filing of the completed assessment-roll in the office of the town clerk on or before the fifteenth day of September, unless the board of supervisors, under authority of the same section, shall permit the filing at a later date.

In a report, not yet filed, of a recent examination of the affairs of Suffolk county, the examiners show that seldom, if ever, are the assessment-rolls delivered to the board of supervisors until after the amount of the levy is determined. This condition of affairs ought to be remedied and the assessors should make an effort to complete the rolls within the time prescribed by the statute.

My reply to your second inquiry is that the law does not prescribe the number of hours per day a town officer must work to entitle him to charge for a day's service. Under section 85 of the Town Law, town officers are entitled to compensation "for each day actually and necessarily devoted by them to the service of the town in the duties of their respective office."

The claim for service must be audited by the town board or board of town auditors. It must be made out in items, verified by claimant and should show the nature or character of the services rendered.

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In the Matter of the PROVISIONS OF THE OLEAN CITY CHARTER
(Laws of 1915, Chapter 535) SECTIONS 5, 22 and 134, Relative
to Contracts with the City by a City Officer

(Dated November 9, 1916)

An assessor of the city of Olean is an elective city officer and as such cannot be interested in any city contract.

The employment of a city assessor as a sewer inspector paid by the city is contrary to the prohibition contained in section 3 of the General City Law. There is no repugnance between the local charter and the General Law, although the language is not exactly identical.

J. F. Consedine, City Auditor, Olean, N. Y., submitted a statement of fact and an inquiry based thereon as follows:

"An assessor of the city of Olean was employed by the street department as an inspector of sewers. Claim was made for wages. The claim was disallowed by the city auditor for the reason that the assessor was an officer of the city; that his employment was a contract between him and the city; that the compensation for such employment was paid from the city treasury, and that such contract was violative of the General City Law and the provisions of the city charter.

"May an officer of the city of Olean be lawfully employed by the street department of such city as an inspector of sewers?"

TRAVIS, Comptroller — The city of Olean, like other cities of the third class, is operating under a special charter. See Laws of 1915, chap. 535. An assessor is an elective officer of the city (§ 5) and receives compensation at the rate of three dollars and fifty cents for each day actually and necessarily employed in the duties of his office (§ 22). Section 134 of the charter reads as follows: "No officer of the city of Olean who is authorized to sell or lease any property or make any contract in his official capacity or take part in making such sale, lease or contract, shall

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be or become interested individually in such sale, lease or contract directly or indirectly."

This provision of the city charter differs somewhat from the related provision contained in the General City Law, section 3. In so far as that section is applicable, it reads: "nor shall the mayor or any alderman, school commissioner or other public officer of any city be directly or indirectly interested either as principal, surety or otherwise, in any contract, the expense or consideration whereof is payable out of the city treasury."

As I read the two statutes, I see no repugnancy between the local and the general law. All that is provided in the city charter provision is included within the wording of the general statute. The general law simply adds to and supplements the provisions of the charter. The two statutes being reconcilable, both should be given effect; this regardless of whether or not the local act was enacted last. Lewis's Suth. Stat. Const. 532.

Dillon, in his work on municipal corporations (§ 773), states very clearly the general rules applicable to this subject. He says: "At common law * * * it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality * * *. The statutory prohibition is frequently so wide in its terms as to prohibit any officer from contracting with the municipality whether he takes part in the making of the contract or not."

The courts, in stating the common-law rule, agree that in the absence of a statute all contracts of a city with its officials are illegal, where the officials in any way control or influence the making thereof on the part of the city. This, Mr. Justice Story said, was because "no man can faithfully serve two masters whose interests are in conflict." Under the common law rule, as stated, in the absence of statutory provisions, it has several times been possible to hold contracts in which an officer of a municipal corporation was interested but which he in his official capacity had no interest or share in making, to be valid and without vice. But in cities of this state, because of the provisions of section 3 of the

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General City Law, such a construction is not possible. The common-law rule, as I view it, has been made stricter or superseded by a more powerful statutory provision. Stated differently, in this state and the legislature has substituted for the common law rule a more stringent provision. Section 3 of the General City Law is more than declarative of the common law. It extends to classes of contracts other than those rendered invalid under the common law.

The case of *McAdam v. Mayor*, 36 Hun, 350, seems to be directly in point. In that case the plaintiff was the chief clerk of a bureau of the city government and was appointed or employed by the department of education to deliver lectures in the evening high school. The charter contained the following provision: "No member of the common council, head of department, chief of bureau, deputy thereof or clerk therein, or other officer of the corporation, shall be or become directly or indirectly interested in or in the performance of any contract, work or business, or the sale of any article, the expense, price or consideration of which is payable from the city treasury."

The plaintiff sued to recover compensation for lectures delivered. It was held that his contract of employment was prohibited by the statute and that he could not recover. In the course of the opinion the court said: "Perhaps it might be said that the legislature never contemplated excluding payment for services such as rendered by the plaintiff herein, though connected with one of the bureaus. But the language of section 59 is very broad, and indicates a determination on the part of the legislature to prevent any person from receiving compensation from the city in two modes or by two methods, thus preventing by any possibility the use of official position for personal aggrandizement."

A minute comparison of the statutory provision under consideration in the *McAdam* case and the wording of section 3 of the General City Law, convinces me that had the latter been before the court it would have said: "The language * * * is very broad, and indicates a determination on the part of the legislature to prevent any person from receiving compensation

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from the city in two modes or by two methods, thus preventing by any possibility the use of official position for personal aggrandizement."

I am of the opinion that section 134 of the Olean city charter does not prohibit or prevent the employment of a city assessor by the department of streets. I do, however, believe and so advise that such a contract of employment is prohibited by section 3 of the General City Law. I therefore conclude that the inquiry should be answered in the negative.

In the Matter of the PROVISIONS OF THE COUNTY LAW, SECTIONS
45, 47 and 48 Relative to Tuberculosis Hospitals

(Dated November 10, 1916)

The expenses of erecting, maintaining and equipping a county hospital for tuberculosis can only be paid for upon the audit of the board of supervisors.

Section 45 of the County Law places it within the power of supervisors of any county to establish a county hospital for the care and treatment of tuberculosis cases. Such institution is to be equipped by its superintendent under the regulations and powers of a board of managers, who must certify all bills and accounts and present them for audit to the board of supervisors.

B. S. Hayes, county treasurer, Watertown, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"The county of Jefferson has constructed a tuberculosis hospital and is about to provide equipment, and the county treasurer submits the following:

"May I legally pay such bills (i. e. for equipment) after the same are audited by the superintendent and board of managers, or must the board of supervisors audit them?"

TRAVIS, Comptroller.—Section 45 of the County Law authorizes the board of supervisors of any county to establish a county hospital for the care and treatment of persons suffering from

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tuberculosis, or it may submit the question to the voters of the county.

Where the establishment of such hospital is decided upon the board of supervisors is, by subdivision 2 of the same section, authorized to erect all necessary buildings, make all necessary improvements and repairs, and alter any existing buildings.

By subdivision 4 of section 45 boards of supervisors are authorized to appoint boards of managers.

Section 48 of the County Law prescribes the duties of the superintendent of the hospital and among other things provides that subject to the by-laws, rules, regulations and powers of the board of managers he "shall equip the hospital with all necessary furniture, appliances and other needed facilities for the care and treatment of patients and for the use of officers and employees thereof, and shall in counties where there is no purchasing agent purchase all necessary supplies."

Subdivision 6 of section 47 of the County Law, as amended in 1913, is as follows: "The board of managers shall certify all bills and accounts including salaries and wages and transmit them to the board of supervisors of the county, who shall provide for their payment in the same manner as other charges against the county are paid. The board of supervisors of a county not having a purchasing agent or auditing commission may make an appropriation for the maintenance of such hospital and direct the county treasurer to pay all bills, accounts, salaries and wages, which are approved by the board of managers, within the amount of such appropriation, subject to such regulations as to the payment and audit thereof as the board of supervisors may deem proper.

The last sentence of this section was inserted in the statute by chapter 40 of the Laws of 1913. The meaning of the words "auditing commission" is uncertain and the words may have been inserted in error. There is no provision in the general laws for an "auditing commission," and it is possible that this expression was intended to refer to county auditor or auditors. A county auditor has been appointed in Jefferson county and, unless his powers are limited by the board of supervisors as prescribed by

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section 216 of the County Law, it devolves upon him to audit all bills properly chargeable against the county. County Law, § 216.

There is nothing in the statute which permits the board of managers or the superintendent to audit accounts and in the absence of express authorization it will not be presumed.

In view of the foregoing my reply is that the bills referred to should be audited by the board of supervisors or the county auditor and that the treasurer may not legally pay the same on the audit of the superintendent and board of managers of the tuberculosis hospital.

In the Matter of the PROVISIONS OF THE GENERAL MUNICIPAL LAW, SECTIONS 13 AND 232, THE TOWN LAW, SECTION 80, as to Bonds in Aid of Railroad Sinking Funds and Disposition of Surplus

(Dated November 16, 1916)

Right of a town to use a surplus fund to reduce the town budget.

Since 1905 the authorities of the town of Duanesburg, in the county of Schenectady, have held in a special bank account the amount refunded by the State of New York on account of taxes collected on railroad property and which should have been deposited in a sinking fund and applied in payment of the bonds. The bonds have since been paid and this surplus may now be applied in reduction of the town debt, if any, or the town budget generally.

H. J. G. Fox, Supervisor, Delanson, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

“The town of Duanesburg, a town in Schenectady county, has a fund established in 1905 amounting to \$4,857.82. It is made up of moneys received from the State as refunds of state taxes on railroads for the construction of which the town had issued so-called ‘railroad aid bonds.’ Since 1905 the authorities of the town have carried this fund on deposit in a bank where it earns 3½ per centum per annum. The indebtedness of the town incurred for the purpose of encouraging and aiding the construction of the railroad has been entirely paid. The supervisor of the town submits the following:

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“Can the fund above mentioned be used to pay legitimate town expenses, and if so, is it necessary to call a special town meeting for the purpose, or may the sum be applied in reduction of taxes by a resolution of the town board?”

TRAVIS, Comptroller.—Between the years 1865 and 1875 various statutes empowering counties, cities, towns and villages to issue bonds to aid in the construction of railroads were enacted by the Legislature of the State. Immediately following the acts authorizing the issuance and sale of such bonds, one was passed which provided and directed that all taxes assessed and levied against, or paid upon, such railroad property should be contributed to a sinking fund for the retirement of the bonds so issued. It later developed that the sinking fund act had not been generally observed, and that the taxes paid upon such railroad property were used and applied as were the other taxes levied and collected in the municipality bonded.

In each year a proportionate part of the tax levied upon railroad property was for State purposes, and, in many instances, that tax was paid with others levied in the same municipality into the treasury of the State. Finally the Legislature authorized counties containing cities, towns or villages which had issued railroad aid bonds and for which sinking funds had not been established, as provided by law, to commence actions in the Court of Claims to recover from the State for the benefit of the interested municipalities all such taxes so paid into the State treasury. It was, as I assume, as the result of such an action commenced by the county of Schenectady, that the town of Duanesburg received in 1905 from the State of New York the fund in question.

Section 232 of the General Municipal Law is entitled, “Investment and application of award.” The award referred to is that made by the Court of Claims in an action such as is referred to above. It provides that the amount which shall be awarded to any county shall be paid to the county treasurer, and that he shall invest or apply the same “in the manner and for the purposes provided in section thirteen” of the General Municipal Law.

That section provides various alternative methods of handling

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and disposing of the proceeds of an award by the Court of Claims, all of which, however, contemplate that the bonds, issued to aid in the construction of the railroad, remain unpaid. One sentence in that section reads as follows: "Upon application of the town board of any town, the board of supervisors of the county in which said town is situated may authorize payment by the county treasurer of all moneys thus paid to him in any year by the railroads mentioned in this section to the supervisor of such town, for its use and benefit; to be applied either to the purchase of outstanding railroad aid bonds or the payment of interest thereon * * *."

The fact that the county treasurer of Schenectady county paid the sum mentioned herein to the town of Duanesburg indicates that the board of supervisors authorized him to do so, as provided in the sentence quoted.

We are, therefore, confronted with a condition where the statutes provide for the application of the award, but only in cases where the railroad aid bonds have not been paid off. Stated differently, this award cannot be applied in the manner which the statute authorizes because before it was received the town had by general taxes raised funds and retired the issue of railroad aid bonds.

Unquestionably, these moneys belong to the town and constitute a surplus in its funds. That being true, section 90 of the Town Law is applicable. It reads as follows: "The supervisor, town clerk and justices of the peace, or a majority thereof in any town in this state, may expend any surplus moneys for which no provision for expenditure is made, belonging to said town, for the purposes of redemption of outstanding bonds or for improvements in said town."

If this town has a bonded indebtedness, the town board may by resolution apply all or any part of this fund, as may be needed, to the redemption of such bonds. If it has no outstanding bonded indebtedness, it may use such funds for public improvements within the town. It was held in *McConnell v. Allen*, 193 N. Y. 318, that section 90 of the Town Law authorizes the town board to use a surplus fund for the improvement of highways.

In the case under consideration the supervisor desires to know

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whether this fund may be used to reduce the town budget for the current year. The statutes do not specifically authorize this to be done. However, as has been seen, if one or more of the appropriations contained in the budget are for the redemption of bonded indebtedness or for public improvements, so much of this fund as may be necessary to offset such appropriations may be used and applied to reduce the budget.

Although there is no statutory authority for using this fund other than to redeem outstanding bonds and for public improvements, I am of the opinion that it may lawfully be used in reduction of taxation by the town board. The town board is a board of limited jurisdiction. Its powers and duties are prescribed in the statutes. It has no powers except such as are expressly conferred, or may necessarily be implied in order that it may properly execute a power or duty imposed. It seems clear to me to be the duty of the town board to manage the affairs of the town as economically as possible and, if surplus moneys not directed to be applied in a specific manner by law are found to be in the town treasury, to apply them in reduction of taxation. I fail to see how the town board can properly serve its town unless it have the implied power to so use them.

I, therefore, conclude that the surplus fund in question may be used to reduce the town budget to the extent to which it contains appropriations for the payment of the bonded indebtedness of the town and for public improvements, and that in my opinion, although there is no express statutory authority for it, it may be applied to reduce the budget generally.

In the Matter of the HIGHWAY LAW, SECTIONS 138-a, 170 and 172 as to Town Budgets and Appropriations for Repairs and Improvement of Highways

(Dated November 16, 1916)

Limitations by a town board in the matter of taxation.

A town supervisor cannot legally include in a budget any appropriation for repairing a State or county highway, nor can a tax to cover such a budget be legally levied and raised. The power of taxation is

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a governmental function belonging exclusively to the legislature. This authority may be and has been delegated to municipalities but has not been delegated to towns.

State and county highways are under the jurisdiction of the State Highway Commission and town boards are not required to provide funds for their improvement and repairs.

Edgar L. Lewis, Supervisor, Huntington, L. I., submitted a statement of facts and an inquiry based thereon as follows:

"At a meeting of the town board of a certain town a budget was prepared to meet the expenses of the town for the ensuing year and one of the items in said budget consisted of a proposed appropriation for repairing the side of a State and county highway. There is no immediate intention on the part of the State to repair, rebuild or, in any way, alter the highway therein referred to.

"Can the supervisor legally include in a budget any appropriation for the improvement described in the statement of facts. If so, can a tax to cover said budget estimate be legally levied and raised?"

TRAVIS, Comptroller.—The power of the State acting through its governmental agencies to tax its citizens is absolute and unlimited as to persons and property. Every person within the jurisdiction of the State whether a citizen or not is subject to this power and every form of property, tangible or intangible, which exists within the jurisdiction of the State may be reached and taken for the support of the State.

"It is obvious that the taxing power is an incident of sovereignty and is co-extensive with that to which it is incident. All subjects over which the sovereign power of a State extends are based on taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation." Chief Justice Marshall in *McCulloch v. Meriden*, 4 Wheat. 316.

The power of taxation consists of two distinct processes or instrumentalities; the first, relating to the levying or imposition of a tax on persons or property; and, the second, the manner of the collection of the taxes levied. The first is a legislative function which cannot be delegated except as the Legislature may con-

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fer the power upon municipalities or political divisions which, through the local authorities, represent the people and represent the power of providing revenue for governmental and public purposes; but the second process refers to the question by whom, when, and through what procedure or remedy the taxes shall be collected and is a matter for legislative determination subject to the rule that the procedure cannot be utterly unreasonable, arbitrary, unequal, or unjust in its operation. *Gautier v. Ditmar*, 204 N. Y. 20.

Thus it will be seen that while it would be improper for the Legislature to leave to municipal authorities the power to determine upon what property and for what purposes a tax should be levied, yet it may lawfully delegate to a ministerial officer the power of using the machinery under the method created by it for the collection of the taxes it has levied.

When the legislative authority to levy a tax is delegated, it must be by express statute and clearly defined procedure. For example, a board of supervisors, while created by the Constitution, derives all its powers to act from the State Legislature. It cannot, therefore, be said to possess any inherent powers, but its exercise of authority must in all cases and, especially in the expenditure of public moneys, be confined to the powers enumerated by statute. *Vincent v. County of Nassau*, 45 Misc. Rep. 247; *affd.*, 110 App. Div. 730.

The power to levy a tax is not delegated by the Legislature to town boards and the case under consideration, as outlined in the statement of facts, is not an exception to the rule. Under certain statutes, certain town officials are required to estimate, certify or report to the board of supervisors the sums necessary to pay expenses of the town due or to become due, but the power to levy rests in the board of supervisors. It is of course limited to the extent and degree of the delegation of this power by the State Legislature. No statute exists which requires the town board to convene for the purpose of preparing a budget, except as provided in chapter 396 of the Laws of 1916, the provisions of which have not been complied with in this instance, and no general power to appropriate funds or to direct them to be raised by tax is vested

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in it. I can find no statute and have been referred to none which authorizes or permits the town board of a town to make an appropriation such as this.

Improved highways in the State of New York are divided, under the Highway Law, into different classes and the State Highway Commission is given exclusive jurisdiction over the classes known as State highways and as county highways. In the question propounded, it is apparent that the town board seeks to do one of two things, (a) improve the highway or (b) repair the same.

If the desired object is improvement, then section 138-a of the Highway Law applies. If maintenance is the object sought in the proposed action of the town board, then section 170 of the Highway Law defines the procedure. In any event the procedure is defined and must be followed if any course of action is pursued.

As heretofore stated, section 138-a of the Highway Law outlines the process by which a State and county highway may be constructed at the joint expense of the State, county and the town through which it passes and the method of meeting the expenses incident thereto is defined. The town board may petition the Highway Commission for an estimate of the additional cost of constructing the highway in the manner desired by the petitioners and upon the approval by the commission of the plans and specifications which may thereafter be proposed, the town board may adopt a proposition to raise necessary funds by the issue and sale of town bonds, the bonds to be issued and sold in the manner prescribed by statute. This additional expense shall be wholly borne by the town but in no event shall the town board act without the conjunction of the State Highway Commission.

Section 170 of the Highway Law provides for maintenance and repair of State and county highways in towns and incorporated villages and also provides that such maintenance and repair may be done in the discretion of the Commissioner of Highways either directly by the department of highways or by contract awarded to the lowest responsible bidder at a public letting after due advertisement and under such rules and regulations as the Commissioner of Highways may prescribe, etc.

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Section 172 of the Highway Law provides for the cost to towns for maintenance of State and county highways to the effect that each town shall pay for the maintenance and repair of State and county highways each year the sum of fifty dollars for each mile or major fraction of a mile of the total mileage of State and county highways within the town, etc. This section further defines the manner in which the Highway Commission shall transmit to the board of supervisors the amount to be levied and raised by taxation for this purpose and further outlines subsequent procedure.

The statute thus appearing to be clear and definite in its terms, would preclude any contrary action by the town board and it would therefore seem conclusive that the action of the board herein is without warrant under the statute and clearly *ultra vires*.

I, therefore, conclude that insofar as an interrogative is stated in the inquiry, it should be answered in the negative in the light of the general theory of taxation as discussed in this opinion together with the clearly expressed and defined terms of statute which, in themselves, negative a contrary course of procedure.

In the Matter of the PROVISIONS OF THE LABOR LAW, SECTION 70
AND 71 and of the PUBLIC HEALTH LAW, SECTION 21, as to
Compensation of Health Officers

(Dated November 28, 1916)

Health officer not entitled to a fee for issuing employment certificates.

A health officer is the chief executive officer of a local board of health. He is required to issue employment certificates and, for such service, is entitled to no extra compensation.

Peter L. Ulrich, Croghan, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

“The town board of the town of New Bremen, in the county of Lewis, a town having a population of less than 8,000, has appointed a health officer and fixed his compensation pursuant to section 20

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of the Public Health Law. Under authority of section 71 of the Labor Law, the health officer has issued employment certificates and has presented to the town board for audit a claim for compensation for such service.

“Is the claim of the health officer, for issuing employment certificates, a legal claim against the town?”

TRAVIS, Comptroller.—Section 21 of the Public Health Law provides that every local board of health shall prescribe the duties and powers of the local health officer, *who shall be its chief executive officer*, and direct him in the performance of his duties, and fix his compensation, which, in the case of health officers of cities, towns and villages having a population of 8,000 or less, shall not be less than the equivalent of ten cents per annum per inhabitant.

Section 70 of the Labor Law provides that no child between the ages of fourteen and sixteen years shall be employed in any factory unless an employment certificate is issued as prescribed in the statute cited. Section 71 of the same statute prescribes that such certificates shall be issued by the commissioner of health or the executive officer of the board or department of health of the city, town or village where such child resides or is to be employed. The statute makes no provision for compensation for issuing such certificates, and since no compensation is prescribed none can be paid. The duty of issuing such certificates clearly devolves on the health officer and his compensation therefor is embraced within the salary fixed by the town board.

My answer, therefore, to this inquiry is that the health officer referred to is entitled to no compensation for issuing employment certificates except that fixed by the town board under authority of section 21 of the Public Health Law.

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In the Matter of the PROVISIONS OF THE CONSERVATION LAW, SECTION 185, and of the DOMESTIC RELATIONS LAW, SECTIONS 14, 15, 19 and 22, Relative to the Fees of a Town Clerk in Connection with Hunters' Licenses and Marriage Licenses

(Dated November 28, 1916)

Amount of such fees payable to town clerk for hunters' licenses and marriage licenses.

The fees of ten cents, when applicant is a resident citizen and of fifty cents when applicant is a non-resident or an alien, are in full for all services required of a town clerk in connection with hunters' licenses. In case of marriage licenses the only fee payable is that to be paid by applicants at the time of the issue of the license.

A. L. Murdock, town clerk, Whitesboro, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"Certain duties devolve on town clerks in connection with the issue to hunters' licenses and marriage licenses. In reference to such provisions,

." (1) May I charge a folio rate for making lists of names and addresses of hunters for filing monthly with the county clerk?

" (2) May I charge for filing marriage licenses in the marriage record book? "

TRAVIS, Comptroller.— Respecting the first inquiry, I find that section 185 of the Conservation Law provides for the issuance of hunting and trapping licenses. Subdivision 3 of that section requires applicants who are citizens and residents of the State to pay a license fee of one dollar together with the sum of ten cents as the fee of the clerk issuing the license. If the applicant is a non-resident of the State or an alien, he must pay the clerk a license fee of ten dollars and the sum of fifty cents as a fee to the clerk.

Subdivision 4 of the same section prescribes that the fees provided for in subdivision 3 be remitted by the town clerks, on the first Tuesday of each month, to the county clerk of the county,

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with duplicate schedules setting forth the name and residence of each licensee and the serial number of and the amount paid for each license issued.

No compensation is provided for the services required by subdivision 4, last above cited, and the only compensation to which a town clerk is entitled for his services in connection with the issue, report and return of hunters' licenses and fees is that prescribed by subdivision 3; that is to say, ten cents when the applicant is a resident citizen, and fifty cents when the applicant is a non-resident or an alien.

My reply, therefore, to inquiry No. 1 is in the negative.

With reference to the second inquiry, I find that the duties of a town clerk in connection with the issue, record and return of marriage licenses are prescribed by sections 14, 15, 19 and 22 of the Domestic Relations Law.

Section 15 provides that before issuing any marriage license the town clerk shall be entitled to a fee of one dollar to be paid by the applicants before or at the time the license is issued.

Section 19 requires each town clerk to keep a book in which he shall record and index all affidavits, statements, consents and licenses, together with the certificate attached showing the performance of the marriage ceremony, which book shall be kept and preserved as a part of the public records of his office.

Section 22 provides that if any town clerk shall fail to comply with any of the provisions of the act (the Domestic Relations Law) he shall be deemed guilty of a misdemeanor and shall pay a fine not exceeding the sum of \$100 on conviction thereof.

No compensation is prescribed for any of the services required of town clerks under the Domestic Relations Law, except the fee payable by the applicants at the time of issue of the license.

My reply, therefore, to inquiry No. 2 is in the negative.

In connection with both of the foregoing inquiries, I call attention to the well-established principles of law that where a duty is imposed upon a public officer, for which no fee or reward is prescribed, none may be allowed, and that nothing is a public charge unless made so by statute.

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In the Matter of the PROVISIONS OF THE PUBLIC HEALTH LAW,
SECTIONS 20, 22 and 25, ARTICLE XX, Relative to the Fees of
Physicians for Reporting Infectious and Contagious or Com-
municable Diseases

(Dated December 15, 1916)

Fees for filing birth and death certificates.

A physician is entitled to a fee of twenty-five cents for each case of infectious and contagious or communicable disease reported by him to the local board of health.

The statute providing for the payment of a fee of twenty-five cents each for filing birth and death certificates was repealed by chapter 619 of the Laws of 1913 and not re-enacted until April 26, 1915, by chapter 385 of the Laws of 1915.

Dr. A. P. Squires, Rotterdam Junction, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

"A physician residing in one of the towns of Schenectady county states that recently he presented to the town board of his town his bill for services for reporting births, deaths and contagious diseases at the rate of twenty-five cents for each item. He states that the board has been advised that the claim is illegal and, although not so stated, it is assumed the claim has been rejected. He also states that the law requires these reports to be made promptly, and that making such reports not only takes a physician's time but also requires expenditure of his money. He then propounds the following:

"*First:* Is this bill legal and should it be audited by the town board?

"*Second:* If I am not entitled to compensation for time and money spent in making these reports, are the laws of the State compelling me to do so constitutional?

"*Third.* If I am not entitled to compensation for time and money spent which the law compels me to do and the law is constitutional where in the Constitution of the State of New York does the State get the authority to compel me to give my services and money without being compensated?"

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TRAVIS, Comptroller.— From the statement of facts outlined above it appears that the inquirer has made claim for making reports of three classes, namely: (a) reports of contagious diseases; (b) reports of births, and (c) reports of deaths.

(a) Reports of contagious diseases:

Section 25 of the Public Health Law (Laws of 1909, chap. 49) outlines the duties of local boards of health and health officers with reference to infectious, contagious and communicable diseases and is, in part, as follows:

“ Every physician shall immediately give notice of every case of infectious and contagious or communicable disease required by the state department of health to be reported to it, to the health officer of the city, town or village where such disease occurs.

“ The physician or other person giving such notice shall be entitled to the sum of twenty-five cents therefor, which shall be a charge upon and paid by the municipality where such case occurs.”

It appears, therefore, that the inquirer is entitled to a fee of twenty-five cents for each case of infectious and contagious or communicable disease reported by him to the local health officer to be audited as other town charges are audited.

(b) Reports of births:

(c) Reports of deaths:

Prior to the passage of chapter 619 of the Laws of 1913, section 22 of the Public Health Law prescribed a fee of twenty-five cents to be paid to the person making and filing birth and death certificates. Section 22 was repealed by chapter 619 of the Laws of 1913, in effect May 21, 1913, and article 20 relating to vital statistics was added to the Public Health Law. No provision was made in the amended statute for the payment of fees for filing birth and death certificates and none could be allowed until the enactment of chapter 385 of the Laws of 1915. The statute last mentioned (Laws of 1915, chap. 385), passed April 26, 1915, restored the provision which allows a fee of twenty-five cents for each birth certificate and each death certificate returned, filed and registered with the register of vital statistics. The law further provides as follows: “All amounts payable to physicians shall

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be certified to by the local registrar annually and paid to said physicians by said municipality." Public Health Law, § 390.

My reply, therefore, to the inquiry with reference to fees for filing birth and death certificates is that in the interval between the enactment of chapter 619 of the Laws of 1913 and the enactment of chapter 385 of the Laws of 1915, in other words, from May 21, 1913, to April 26, 1915, no fees were provided by statute for these services and none could be paid. Since April 26, 1915, the law provides a fee of twenty-five cents for filing such certificates and for certificates filed since that date claimant is entitled to be paid.

In view of the foregoing statement of law, it seems unnecessary to discuss the questions with reference to the Constitution and the constitutionality of the statute requiring the filing of the certificates referred to.

In the Matter of the PROVISIONS OF THE COUNTY LAW, SECTIONS 21 AND 22, and of the ELECTION LAW, SECTIONS 437 AND 438, in Relation to the Publication of Statements of Canvass and Determinations of the Board of Canvassers

(Dated December 15, 1916)

The determinations of the board of county canvassers under section 438 of the Election Law — what may be included in the determination.

All the determinations of the county board of canvassers and the statements upon which they are based are required to be published in one issue of two newspapers designated by the board of supervisors.

Clarence C. Squier and Fred C. Bool, Commissioners of Elections, Ithaca, N. Y., submitted a statement of facts and inquiries based thereon as follows:

"The commissioners of elections of Tompkins county submit a copy of the form of determination of the board of canvassers in relation to the votes at the last general election. They refer to section 438 of the Election Law and to sections 21 and 22 of chapter 686 of the Laws of 1892, and propound the following:

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“ 1. Shall the determination be published for each separate county officer elected in the county ?

“ 2. Can the determination be combined as to all the officers elected in the county, as in form submitted ?

“ 3. In how many newspapers shall it be published, and how many times ?

“ 4. Is there any specified time for publication ?

“ 5. Is it necessary to publish any of the tabulated vote ?

“ 6. Is the form of determination submitted in proper form ? ”

TRAVIS, Comptroller.— Section 437 of the Election Law provides that upon the completion by a county board of canvassers of the canvass of votes of which original statements of canvass are, by law, required to be delivered to them, by the boards or officers with whom the same may have been filed by the inspectors of election, they shall make *separate* statements thereof. The section then enumerates the *separate* statements required to be made, as will appear by reference to the section cited. The section further provides as follows: “ The statements required by this section shall each be certified as correct over the signatures of the members of the board, or a majority of them, and shall be filed and recorded in the office of the board of elections of each county. * * *.”

Section 438 of the Election Law reads, in part, as follows: “ Upon the completion of the statements required by the preceding section the board of canvassers for each county shall determine what person has by the greatest number of votes been so elected to each office of member of assembly to be filled by the voters of each county for which they are county canvassers if constituting one assembly district, or in each assembly district therein, if there be more than one, and each person elected by the greatest number of votes to each county office of such county to be filled at such election, and if there be more than one school commissioner district in such county, each person elected by the greatest number of votes to the office of school commissioner to be filled at such election in each district. * * *.

“ All such determinations shall be reduced to writing and signed by the members of such board, or a majority of them, and filed

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and recorded in the office of the board of elections of such county, except in the counties wholly within the city of New York, and in such counties the county clerk, *who or which shall each cause a copy thereof, and of the statement filed and recorded in his or its office, upon which such determination was based*, to be published in accordance with the provisions of the laws of eighteen hundred and ninety-two, chapter six hundred and eighty-six, sections twenty-one and twenty-two."

Sections 21 and 22 of chapter 686 of the Laws of 1892 are now in substance re-enacted as sections 21 and 22 of the County Law (Laws of 1909, chap. 16), and are as follows:

"§ 21. *Compensation for publication of local laws.*— The charge for the publication of laws of a local nature in the newspapers designated to publish said laws shall be paid by the several counties of the state in which said laws may be published in the manner and at the compensation prescribed by section forty-eight of the legislative law."

"§ 22. *Election notices and official canvass.*— Such boards, except in the counties of Erie and Kings, shall, in like manner, designate two newspapers, representing respectively each of the two principal political parties into which the electors of the county are divided, in which shall be published the election notices issued by the secretary of state, and the official canvass, and fix the compensation therefor, which shall be a county charge."

In the light of the foregoing excerpts from the statutes, it is apparent that inquiry No. 1 should be answered in the negative, and that inquiries No. 2 and 6, respectively, in the affirmative.

Referring to inquiry No. 3, I am of the opinion that section 438 of the Election Law, read in connection with section 22 of the County Law, requires the publication of the determination and of the statement upon which the determination is based, to be published in two newspapers, designated by the board of supervisors and which represent respectively each of the two principal political parties into which the electors of the county are divided, and that the statute contemplates the publication in only one issue of each newspaper.

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With regard to inquiry No. 4, it is apparent that the statutes are silent as to the time of publication, but it is undoubtedly the legislative intent that publication shall be made as soon as practicable after the completion of the filing of the statements and determinations.

Referring to inquiry No. 5, attention is directed to the italicized part of section 438 of the Election Law cited herein.

However, it should be noted that county boards of canvassers are required to determine only the persons elected to the office of member of Assembly, school commissicner and each county office, and the requirement of publication of statements, that is, the tabulated vote, is limited to such offices. Opinions of the Attorney-General, 1912, p. 423.

In the Matter of the PROVISIONS OF THE COUNTY LAW, SECTIONS
191 AND 240 as to the Salary of a Coroner and his Necessary
Expenses

(Dated December 23, 1916)

Rule applicable only where the office is a salaried one and not a fee office.

A coroner receiving a salary instead of fees is entitled to reimbursement for expenses actually and necessarily incurred by him in the discharge of his duties.

Herschel L. Gardner, Elmira, N. Y., submitted a statement of facts and an inquiry based thereon as follows:

“A coroner in a certain county who is a salaried official renders a bill for disbursements which covers the use of an automobile, railroad fares, etc., going from his office to places where bodies have been found and asks reimbursement from the county.

“Can the board of supervisors of this county audit and allow his account in full if it has been proven that the disbursements were actual and necessary?”

TRAVIS, Comptroller.—Section 191 of the County Law provides that “the board of supervisors of any county shall have power to prescribe that coroners in said county shall receive a salary, instead of fees, and to fix the amount of such salary; and

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thereafter coroners in said county shall receive for their services only the salary so fixed and shall not be entitled to any fees whatever except when performing the duties of the sheriff, in which last named case the coroner so acting shall have the same compensation as the sheriff whose duties he performs would have had."

Subdivision 9 of section 240 of the County Law provides that the following is a county charge which may be lawfully allowed and paid: "The moneys necessarily expended by any county officer in executing the duties of his office in cases in which no specific compensation for such services is provided by law * * *."

The question now arises as to the purport of section 191, quoted herein, in relation to the extent of the compensation provided for. In the language of the statute the coroners shall receive for their services only the salary so fixed and shall not be entitled to any fees whatever. I do not deem, however, that a construction sufficiently broad can be placed upon this statute to embrace all necessary and actual disbursements of the coroner who presents this bill and asks for reimbursement.

The question of what disbursements a public officer, servant or agent of a private corporation is entitled to have repaid him depends largely on the nature of his duty or the manner in which it is necessary to conduct the business. It is the duty of the coroner to seek all possible information as to the cause of death of a person who died under circumstances surrounded with mystery and it is clearly fundamental to this investigation that the coroner shall view the remains and attempt to ascertain the cause of death at the earliest practical moment after the death has been reported to him.

If the actual and necessary expenses incurred in the performance of his official duties were not allowed it would tend to place a premium on inactivity and inattention to his duties as the extent of the necessity for the services would determine to a great degree the fact as to whether or not the coroner would be compelled to perform the duties of his office at a pecuniary loss to himself. In other words, if the coroner were called upon to perform his

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duties, in many instances at places remote from his legal residence, his necessary expenditures might exceed the salary fixed under section 191 of the County Law quoted herein. There does not appear to be any difficulty in the statutory provision of the subject as subdivision 9 of section 240 of the County Law cited herein provides reimbursements of expenditures necessarily incurred in cases "in which no specific compensation for such services is provided by law."

The salary fixed is presumed to compensate for services and makes no provision for expenditures. *People ex rel. Wood v. Denton*, 41 App. Div. 386; *Matter of Kane v. McClellan*, 110 id. 44.

I am, therefore, of the opinion that the coroner, whose disbursements in the discharge of his duties are made the subject matter of this inquiry, should be reimbursed for all necessary and actual disbursements incurred by him in the discharge of said duties.

In the Matter of the Estate of JOHN E. MCINTOSH, Cayuga
County

(Dated February 20, 1916)

Claim of executors that the Federal estate tax and the transfer tax paid the State of Utah on Union Pacific stock should be deducted from decedent's estate in the State of New York.

In this estate the Federal estate tax amounted to the sum of \$86,301.43 and the transfer tax paid the State of Utah on certain shares of Union Pacific stock owned by the decedent, which said tax amounted to \$6,425.06, and the executors of decedent's estate submitted the contention that these payments should be allowed as a deduction in this State. As the Federal statute must be considered a tax on the transfer to or a succession to property the amount of such Federal tax is not a proper deduction from the decedent's gross estate in determining the decedent's net estate liable to taxation for either State or Federal purposes.

As to the payment to the State of Utah for transfer on the stock of the Union Pacific Railroad the courts have uniformly held that the inheritance taxes imposed by another State are not a proper deduction. Cases cited.

George B. Turner, Auburn, N. Y., submitted a communication showing the payments made by the executors under the Federal

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statute and under the Utah State Transfer Act and submitted the proposition that these sums should be allowed as a deduction from the decedent's estate.

TRAVIS, Comptroller.— The estimated Federal estate tax, or any sum actually paid to the Federal government on account of the Federal estate tax, cannot logically be allowed as a deduction from the decedent's gross estate *because the amount of this tax must be computed upon the net estate as determined by section 203 of the Federal statute.*

From an analysis of the several sections of this statute it appears that

Section 201 of the Federal statute provides "that a tax * * * *to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent,*" etc.

Section 202 provides the manner in which the gross estate shall be determined and states the property or interests which shall be included in the gross estate.

Section 203 provides "that for the purpose of the tax the value of the *net estate shall be determined* —

"(a) In the case of a resident, by deducting from the value of the gross estate —

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; and

"(2) An exemption of \$50,000."

From the foregoing it is apparent that the Federal estate tax is upon the *net* estate of the decedent after the aggregate deduc-

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tions mentioned in (1) above and the exemption mentioned in (2) above have been deducted from the *gross* estate.

The first thing then for us to determine is the manner or procedure by which the decedent's *net* estate can be ascertained as contemplated by the Federal statute, and such determination must necessarily solve the question raised on this appeal.

Referring again to section 203 of the Federal statute, we find nothing in the statute itself that authorizes or even contemplates the deduction of a sum representing the Federal tax from the gross estate in determining the amount of the decedent's *net* estate, but, on the contrary, section 203 is very explicit in specifying *how* the *net* estate for the purpose of imposing the Federal tax thereon shall be *ascertained and determined*.

Again at section 205 of the Federal statute, where reference is made to the return the executor or administrator must file with the collector of the Federal tax, we find —

“ * * * The executor shall also * * * file with the collector a return under oath in duplicate, setting forth

“(a) the value of the gross estate * * * ;

“(b) *the deductions allowed under section two hundred and three;*

“(c) the value of the net estate of the decedent *as defined in section two hundred and three;* and

“(d) the tax paid or payable thereon; * * * .”

It would seem, therefore, that for the purpose of determining the decedent's *net* estate upon which the Federal tax is based and computed the executor or administrator is confined strictly to the provisions of said section 203, and if the court should hold that the estimated Federal tax was a proper deduction from the gross estate in the proceedings to determine the State inheritance tax it would be reading into the Federal statute a wholly unwarranted provision. The Federal tax would then be imposed upon the transfer of the decedent's *net* estate *less whatever sum the estimated Federal tax* might appear to be; and there is absolutely no justification in the Federal statute to warrant such a deduction in addition to those enumerated in section 203.

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Prior to 1910 our State inheritance tax was determined upon the *net* estate of the decedent transferred to taxable persons. And although many questionable claims for deductions were presented from time to time, yet no one, to my knowledge, ever contended that in ascertaining the decedent's *net* estate it was proper to deduct a sum representing the estimated tax from the gross estate, before the inheritance tax was determined; and our courts have even held (*Matter of Swift*, 137 N. Y. 77) that where the decedent's will directed that all inheritance taxes should be paid as an administration expense, that the residuary estate *should not be reduced* by the amount of such taxes before the tax on the residuary estate was determined.

I am inclined to believe, therefore, that if the Federal statute can be considered a tax on the transfer of or the succession to property, that the foregoing analysis shows clearly that the amount of such Federal tax is not a proper deduction from the decedent's gross estate in determining the decedent's *net* estate liable to taxation for either State or Federal purposes.

As to the amount paid the State of Utah for transfer tax on the stock of the Union Pacific Railroad, our courts have uniformly held that the inheritance tax imposed by another State is not a proper deduction. Among the later decisions see *Matter of Estate of Josephine Penfold*, 85 Misc. Rep. 598, and cases cited; *affd.*, 216 N. Y. 163; also *Matter of William H. Penfold*, 87 Misc. Rep. 525, and cases cited; *affd.*, 216 N. Y. 171.

In the Matter of the Estate of MARGARET STIMSON (New York County)

(Dated January 10, 1917)

Power of State Comptroller's representative to examine and make lists of property when the intended delivery or transfer by safe deposit companies or other corporations when such property stands in the name of decedent and one or more persons.

Section 227 of the Tax Law provides that it shall be lawful for the State Comptroller personally or by representative to examine any such

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securities, deposits or assets at the time of such delivery or transfer. Obviously such representative cannot be expected to carry in mind from one brief examination a description of the bonds, stocks and other assets comprising the contents of any safe deposit box, therefore, the listing or taking an inventory of such securities or property is within the statute. In this case it appears that at the death of Margaret Stimson, safe deposit box No. 806 in the vaults of the Fifth Avenue Bank, New York city, was opened in the presence of the Comptroller's representative. This box was leased and stood in the names of Daniel M. Stimson and his daughter, the decedent. The representative of the State Comptroller was, however, refused permission to make a listing of the contents of the box. All the property found in said box was claimed by the surviving lessor, Daniel M. Stimson, as his individual property. The Comptroller can find no reason under the facts in this case from departing from his rule which requires his representative to list the contents of every safe deposit box he examines under said section 227 of the Tax Law.

LaFayette H. Gleason, New York city, on January 5, 1917, submitted to the Comptroller letters, affidavits, etc., in regard to the listing of a safe deposit box in the name of the above decedent and another and requested to be advised as to the ruling of the Department upon the facts stated in the instrument submitted.

TRAVIS, Comptroller.—When the Legislature provided that the State Comptroller should be given notice of the intended delivery or transfer by safe deposit companies, trust companies, banks or other institutions of property in their possession or under their control, belonging to a decedent or belonging to or standing in the joint names of such decedent and one or more persons, and also authorized the Comptroller to examine such property so to be delivered or transferred, the Legislature must have taken into consideration the physical impossibility for the State Comptroller to attend the opening of all safe deposit boxes and make such examinations personally at the same hour in the several counties of the state. Therefore section 227 of the Tax Law provided: “* * *. And it shall be lawful for the said state comptroller, personally or by representative, to examine said securities, deposits or assets at the time of such delivery or transfer.”

The statute does not attempt to define just what is meant by such *examination* or the extent of the examination of the property

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at this time by the Comptroller or his representative. But it is reasonable to assume that the examination which the statute authorizes the Comptroller to make applies to or was intended to include whatever property was found in the possession or under the control of the bank or other depositary and in respect to which and by reason of the provisions of section 227 of the Tax Law it had become necessary to give notice to the State Comptroller of the intended delivery or transfer thereof.

The Comptroller has elected to appear by a representative at the opening of all safe deposit boxes, and such examination is necessarily the first knowledge the State Comptroller will have of the contents of the box or of the property to be so delivered or transferred; and it is unreasonable to assume that the Legislature intended the Comptroller's representative to carry in his mind from this one brief examination a description of all the bonds, stocks or other assets comprising the contents of any safe deposit box. If it were an actual possibility for him to do so no one would contend but what the Comptroller's representative might make a list of the whole contents of the box after he had returned to his office. But in order to avoid mistakes and to insure absolute accuracy, as well as to advise the State Comptroller of the contents of such boxes, the Comptroller has instructed his representatives to make a list of the securities or assets when they are first taken from the box.

The statute makes the State Comptroller an interested person in the appraisal of every estate and authorizes him to obtain information as to the contents of safe deposit boxes, personally or by a representative, whenever the condition arises under section 227 of the Tax Law; and it necessarily follows that this provision of the statute for the protection of the State would be a nullity if the Comptroller's representative could not inform the Comptroller as to the contents of any safe deposit box.

I believe, therefore, the courts would hold that the authorized *examination* by the Comptroller at this time would necessarily include the right to make a list of the contents of the box as an incidental right contemplated and justified by the Legislature

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when it authorized the Comptroller to examine the contents of safe deposit boxes by a representative in order that the Comptroller might have the necessary data before him at the time the estate is appraised for transfer tax purposes, which is generally several months after the examination of the contents of the box.

This rule or direction of the Comptroller as a part of the duties of his representative upon the examination of the contents of safe deposit boxes is now questioned, because it appears from the papers you forwarded that at the time of the death of Margaret Stimson a safe deposit box No. 806, in the vaults of the Fifth Avenue Bank, New York city, was leased and stood in the names of Daniel M. Stimson and his daughter, Margaret Stimson, the decedent above named; that by arrangement this box was opened on or about the 3d day of January, 1917, in the presence of the following persons: J. R. Little, representing the State Comptroller, Dr. Daniel M. Stimson, the surviving joint owner or lessor of the box, Mr. David W. Swain, of 49 Wall street, New York city, and Beverly R. Robinson, one of the executors of the estate of Margaret Stimson, deceased; that the only property found in said box at that time consisted of bonds payable to *bearer*, and stock certificates registered in the name of Daniel M. Stimson; that all of the property so found in this box was claimed by the surviving lessor, Daniel M. Stimson, as his individual property; that the executors of the estate of the daughter Margaret Stimson made no claim whatsoever to any of said property; that the Comptroller's representative, Mr. Little, asked to be allowed to make a list or inventory of the contents of the box, but Dr. Stimson refused to permit the making of such inventory; that thereupon the Comptroller's representative, Mr. Little, resealed the box and returned it to the custody of the bank.

In considering the facts just enumerated and applicable to the question now under consideration the Comptroller can find no reason to depart in the least from his rule which requires his representative to make a list of the contents of every safe deposit box he examines under section 227 of the Tax Law.

In reaching this conclusion I desire you to bear in mind that

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the department has no intention or desire to perform its duties under the Transfer Tax Law in such a manner that it necessarily exposes to the public the wealth of any of the citizens of the State during their lifetime. But in this case the joint lessor, Daniel M. Stimson, is presumed to have known the provisions of section 227 of the Tax Law relative to the examination of the contents of safe deposit boxes in the joint names of a decedent and one or more persons, and if he permitted his individual property to remain in this box until after the death of the joint lessor, his property must necessarily be subject to examination as a part of the contents of this box.

Nor does the department contend but what the bonds payable to bearer and the stock standing in the individual name of Daniel M. Stimson found in said box may be shown to have been the property of the said Daniel M. Stimson, yet the ownership of property found in a safe deposit box can not be determined or even considered either by the Comptroller, the executors of the deceased joint owner's estate, or any other interested person *at the time of the opening of this box*.

The statute does not contemplate that a box may contain the individual property of a person other than the deceased owner or lessor or joint owner or lessor of a box. and therefore makes no provision for the disposition of property claimed by a living person other than a joint owner.

The proceeding to examine the contents of a safe deposit box is not one where the presumption of ownership of the decedent of the contents of the box can be rebutted by proof of any claimant. This, in my opinion, can only be shown before the appraiser or the surrogate, and all that is contemplated or can be done at the time of the opening of the box is the examination by the Comptroller or his representative of the contents of the box. Whether the property therein contained belonged to the decedent or to the joint owner or lessor of the box or a stranger has nothing to do with the Comptroller's examination of the contents of such box.

If a person allows his individual property to remain in a safe deposit box until the death of the joint owner or lessor he neces-

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sarily and voluntarily subjects his property to the same examination under section 227 of the Tax Law that is authorized in respect to the delivery or transfer of the property of the decedent.

If the statute gave me any authority to consider the ownership of property found in a safe deposit box at the time the box was first opened then I can see there might be some force in the contention of the joint owner of this box that his individual property should not be listed, but even his objection then would not apply to bonds payable to bearer, which is a part of the property found in this joint box.

STATE INDUSTRIAL COMMISSION

In the Matter of the Claim of JACOB HELLMAN, for Compensation under the Workmen's Compensation Law, against MANNING SAND PAPER COMPANY, Employer; AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Claim No. 14739

(Decided August 27, 1916)

Rehearing in the matter of injuries received by Jacob Hellman while employed by Manning Sand Paper Company.

The original claim herein was heard on December 8, 1915, and on several subsequent dates, the last of which was on March 29, 1916, when an award was made. Subsequently the case was reopened and, the present application having been heard, an award was made on the basis of disability for fifty-four weeks from August 15, 1915, to August 27, 1916.

Robert W. Bonyngé, Chief Counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On August 1, 1915, the day when Jacob Hellman received his injuries, he resided at 6 Swan street, Green Island, N. Y., and was employed as a night watchman by Manning Sand Paper Company, a corporation engaged in the business of manufacturing sand paper with an office at Green Island, N. Y., and a plant at Railroad avenue at Watervliet, N. Y. The duties of Jacob Hellman were to watch the premises to discover incipient fires and to see that no depredations were committed on the premises. It was also his duty to keep the furnaces under the boilers supplied with coal and also from six to twelve times during the night to

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lift glue pots weighing from 90 to 100 pounds, a distance of about three feet and pour the glue into the vats.

On said date at about 7 p. m., while Jacob Hellman was working for his employer at his employer's plant, and was standing on the front platform of the factory, two men came up to him and he asked them what they were doing on the premises. They said, "nothing," and then immediately assaulted him and took a nickel from his pocket and threw him down the steps from the platform to the ground, a distance of about seven feet, where he struck his right shoulder against a railroad rail of the switch which runs by the factory. While this struggle was going on with one of the men, the other man ran into the factory and stole Hellman's lunch box. The striking against the rail caused an injury to the left shoulder of Jacob Hellman and a severe bruise on top of the same. About a year and one-half before this accident, Hellman had fractured his right humerus and there had been an incomplete healing from this injury. Thereafter he could not raise his right arm above the horizontal and the deltoid muscle consequently became atrophied which was a permanent condition. After this accident, on August 1, 1915, Jacob Hellman had an almost complete paralysis of the right arm except that he could move his forearm about forty-five degrees from the perpendicular and this condition persisted until the date hereof and still exists. This last mentioned condition is the result of the accident of August 1, 1915, and has caused a disability to work from the date of the accident until August 27, 1916, and on that date he was still disabled.

The average weekly wage of Jacob Hellman was the sum of eleven dollars and four cents. Jacob Hellman worked seven nights a week.

Award of compensation is hereby made against Manning Sand Paper Company, employer, and American Mutual Compensation Insurance Company, insurance carrier, to Jacob Hellman, injured employee at the rate of seven dollars and sixty-nine cents weekly for a period of fifty-four weeks from August 15, 1915, to August 27, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of LOUIS STAUFENBERG, for Compensation under the Workmen's Compansation Law, against JOHN F. MULLER & SON, Employer; CASUALTY COMPANY OF AMERICA, Insurance Carrier

Claim No. 35902

(Decided August 28, 1916)

Injuries received by Louis Staufenberg while employed as a plumber by John F. Muller & Son — supplemental application.

This case was originally decided December 28, 1914, upon the basis of temporary disability of the right index finger by the claimant. Subsequently, as a result of further hearings, a decision was made, upon the basis of the loss of the right index finger. An award is herein made for a period of forty-six weeks from October 2, 1914, for the equivalent of the loss of the right index finger, and the employer and insurance carrier are credited with the payment of twelve weeks' compensation heretofore paid by them.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Lyman A. Spalding, attorney for insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On October 2, 1914, the day when Louis Staufenberg received his injuries, he resided at 619 Midwood street, borough of Brooklyn, city of New York, and was employed as a plumber by John F. Muller & Son, who were engaged in the plumbing business, with an office at 27 Willoughby street, Brooklyn, N. Y.

On said date, while Louis Staufenberg was working for his employer at the premises 174 Willoughby street, borough of Brooklyn, where his employer was performing a contract for the laying of sewer pipes, and while engaged in taking an old iron sewer pipe out of the ground, he received a laceration from a sharp

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edge of the pipe on the back of the hand and down the right index finger to its extremity, and the wound later became infected, involving the right arm and requiring surgical interference and resulted in a permanent ankylosis of the right index finger at the first and second joints and a consequent permanent loss of use of that finger. The period of actual disability from working ran from the date of the accident to January 6, 1916, a period of fourteen weeks. Subsequent to said last mentioned date, Louis Staufenberg was able to work in spite of the ankylosed condition of said finger. Compensation was paid for a period of twelve weeks by the insurance carrier.

The average weekly wage of Louis Staufenberg was the sum of twenty dollars and nineteen cents.

Award of compensation is hereby made against John F. Muller & Son, employer, and Casulty Company of America, insurance carrier, to Louis Staufenberg, injured employee, at the rate of thirteen dollars and forty-six cents weekly for a period of forty-six weeks from October 2, 1914, for the equivalent of the loss of the index finger of the right hand, and the employer and insurance carrier are hereby credited with the payment of twelve weeks' compensation heretofore paid by them.

In the Matter of the Claim of MARY F. FLEMING and Minor Child, for Compensation under the Workmen's Compensation Law, for the Death of JAMES FLEMING, against ROBERT GAIR COMPANY, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 672

(Decided August 30, 1916)

Injuries received by James Fleming, resulting in his death, while employed as a laborer in the container department of Robert Gair Company.

On March 14, 1916, while James Fleming was employed in the borough of Brooklyn, city of New York, as a laborer by the Robert Gair Company, he sustained a strain while unloading a heavy case of goods, causing an inguinal hernia, and necessitating an operation, from which, together

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with pneumonia and shock, he died March 25, 1916. His average weekly wage was the sum of thirteen dollars and eighty-five cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On March 14, 1916, the day when James Fleming received the injuries which resulted in his death, he resided at 419 Eleventh avenue, borough of Brooklyn, city of New York, and was employed as a laborer in the container department of Robert Gair Company, a corporation engaged in the business of manufacturing corrugated paper goods and boxes, with a plant and place of business at the foot of Washington street, borough of Brooklyn, city of New York.

On said date while James Fleming was working for his employer at his employer's plant, and while engaged in pushing or pulling a heavy truck of goods over the floor, he received a severe strain by reason of his effort in moving the truck, causing an inguinal hernia. On March twenty-second he was operated upon at the hospital for the hernia and after the operation, contracted ether pneumonia by reason of the operation, which pneumonia and the shock attending the operation caused his death on March 25, 1916.

The average weekly wage of James Fleming was the sum of thirteen dollars and eighty-five cents.

James Fleming left him surviving his widow, Mary Frances Fleming, aged twenty-nine years, and a posthumous daughter, Katherine Fleming, born May 28, 1916, the claimants herein, and no other child or children under the age of eighteen years.

Award of compensation is hereby made against Robert Gair

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Company, employer, and the Travelers' Insurance Company, insurance carrier, to the widow and daughter of James Fleming, deceased employee, as follows: to Mary Frances Fleming, widow, aged twenty-nine years, at the rate of four dollars, fifteen and six-tenths cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Katherine Fleming, daughter, born May 28, 1916, at the rate of one dollar, thirty-eight and one-half cents weekly until she shall arrive at the age of eighteen years.

In the Matter of the Claim of THOMAS SULLIVAN, for Compensation under the Workmen's Compensation Law, against WILLIAM PRESTON and GEORGE PRESTON, Employer; FIDELITY AND CASUALTY COMPANY OF NEW YORK, Insurance Carrier

Claim No. 46532

(Decided September 5, 1916)

Injuries received by Thomas Sullivan while employed as a lumberman by William Preston and George Preston.

On October 9, 1914, while Thomas Sullivan was employed as a lumberman by William and George Preston, copartners, he was cutting rough lumber at Indian Pass, North Elba, when he was cut on his left knee by an axe, causing a wound involving the left knee joint. He was removed to the hospital and was disabled from work up to and including September 28, 1915, and on that date was still disabled. His average weekly wage was the sum of twenty-three dollars and six cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Ainsworth, Carlisle & Sullivan, attorneys for employer and insurance carrier.

Francis B. Cantwell, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Com-

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mission makes its conclusions of fact, ruling of law, award and decision as follows:

On October 9, 1914, the day when Thomas Sullivan received his injuries, he resided at Newman, N. Y., and was employed as a lumberman by Will and George Preston, copartners, engaged in the business of lumbering in the Adirondack Mountains, with headquarters at Lake Placid, N. Y.

On said date while Thomas Sullivan was working for his employer on a lumber job at Indian Pass, North Elba, N. Y., where he was engaged in cutting lumber in the rough, he put his axe on the ground and proceeded to gather up the loose brush wood which was lying around in order to throw it out of the way. In doing so, he accidentally tossed his axe, which was lying on the brush wood, against his left knee, thereby causing an incised wound involving the left knee-joint which later developed an acute septic synovitis. The next morning George Preston carried him out of the camp to Lake Placid in order that he might receive medical treatment. He was later taken to the hospital by reason of the septic condition of his wound, and was thereafter disabled from working by reason of said injury up to and including September 28, 1915, and on that date he was still disabled. The left leg is permanently shortened about one inch and severe pain is experienced after using that leg a short while, which condition has resulted in a disability to work for the period above mentioned.

On the 25th day of June, 1913, William and George Preston entered into a contract with the J. & J. Rogers Company, a corporation whose office was at Ausable Forks, Clinton county, N. Y., under which the Prestons undertook to cut upon the land of the said company all the spruce and balsam pulp wood of a quality suitable for the making of first quality sulphite pulp on that portion of lots 27, 28 and 29, Township No. 12, Old Military Tract, in the Indian Pass, so as to do an equal portion each year of the most expensive lumbering and deliver the same to the amount of 3,000 cords on or before the 1st day of April, 1914, at the Indian Pass pond, and the balance of the wood on the above described territory to be delivered at the rate of from 4,000 to

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5,000 cords each year until the whole tract shall be denuded of such lumber. The wood was to be cut in lengths of four feet with other specific directions in respect of the size and shape of the lumber. The Prestons were to construct their roads through the woods so as to be able to make delivery to the streams running to the pond. The wood was to be placed on skids alongside the various roads, and there measured by the wood agent of the Rogers Company. The contract price was four dollars and fifty cents per cord of wood fully delivered. Payment was to be made on the basis of two dollars and sixty cents a cord for the wood piled on the job, *i. e.*, on the skids beside the road, in monthly payments, as per measurements, except during the months of April, May and June of each year, the balance to be paid each year according to the amount delivered at the pond aforesaid, twenty-five cents per cord, however, being retained as protection and guaranty for the fulfillment of the contract above mentioned.

The cutting of the wood in the Adirondacks is governed by custom among the lumbermen as to the hiring of help and the periods of work. The custom is substantially as follows: The men in the lumber districts are all well known to each other and their individual capacities and efficiency are also well known. Any of the lumbermen may take a contract to cut a strip of wood at so much per cord for the delivered wood. He then goes to other lumbermen of his acquaintance of known capacity in the business of cutting lumber and engages them to cut various strips of the tract which he has undertaken to cut. These men work in teams of two called "partners." These partners undertake to cut a strip and put the wood alongside of the road in order that the general contractor may gather it up for delivery. These partners may then offer a portion of their strip to other partners, usually at a price trifle less than they, themselves, are to receive, and these new partners may in turn offer a portion of their strip to additional men, and this method goes on *ad infinitum*. This custom was the method used by William and George Preston for having the work done under their contract with the Rogers Company. They, themselves, established a camp in the woods with several men working in it. Some of the men worked on the con-

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struction of the roads by the month and some of the men worked in the cutting of the wood and piling of the wood alongside the road. In order to increase their facilities for performing the contract and for cutting the wood, they engaged Musgrove & Wood to cut a strip of the wood. Musgrove & Wood in turn established their camp and proceeded to cut wood, they, themselves, doing the work, and they in turn engaged Sullivan and Will Roberts to cut a small strip. Musgrove & Wood were acting as "partners" and Sullivan and Roberts were acting as "partners," i. e., they divided evenly between them the total receipts for the wood cut. There were other camps on the tract of land similar to the Musgrove & Wood camp, cutting wood for Prestons. Prestons were to pay Musgrove & Wood three dollars and fifty cents per cord for the wood put upon the river bank and Musgrove & Wood paid Sullivan two dollars per cord for wood piled on the side of the road. The price for the actual cutting of the wood varied in the district from one dollar and fifty cents to two dollars, according to the difficulty of the particular job. Preston Bros. established a camp at which it boarded its men. The men who worked on the road received so much a month and board. The men who worked in cutting the wood received so much a cord and if they boarded in the Preston camp, would pay the Prestons a certain amount for board. Musgrove & Wood had a camp about three rods from the Preston camp and the same arrangements prevailed. These camps operated what was called a "van" from which supplies were furnished to the men, such supplies consisting of axes, saws, rubber shoes, tobacco, etc. Musgrove & Wood ran a van and purchased their supplies at Lake Placid, and if they ran short, would purchase from the Preston camp. There was no profit made on these supplies. The van was run for the convenience of the men. The men working on the tract embraced in the Musgrove & Wood undertaking were paid by means of orders drawn on the Prestons and signed by Musgrove & Wood. These orders were delivered to the men against wood cut and placed along the road and duly measured and certified to by the wood agent. Preston Bros. paid these orders and charged

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them against any money that was due to Musgrove & Wood. The men who would take the smaller tracts to cut were known as "little bosses," that is, all persons cutting wood under the Prestons were known as "little bosses." Owing to the fact that these men were all skilled in cutting wood, there was little supervision required of their work. They were told the length and sizes into which the wood was to be cut. Any one of the men could take on men to cut a portion of his tract and no objection would be raised unless the man taken on was known to be inefficient and undesirable. There were no specific hours of work for any of the men and all that was required of the men was that they should cut the tract designated in the manner designated. All these men working in these lumber camps, including the "little bosses" are actually engaged in the cutting of lumber or the hauling of lumber and are all in the employ of William and George Preston, and the custom above outlined is merely a method for obtaining facilities and increasing facilities in the lumber business. Thomas Sullivan was an employee of William and George Preston within the Workmen's Compensation Law.

The average weekly wage of Thomas Sullivan was the sum of twenty-three dollars and six cents.

Award of compensation is hereby made against William and George Preston, employers, and Fidelity and Casualty Company of New York, insurance carrier, to Thomas Sullivan, injured employee, at the rate of fifteen dollars weekly for a period of forty-eight and one-half weeks from October 23, 1914, to September 28, 1915, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of MORRIS STECKLOW, for Compensation under the Workmen's Compensation Law, against ISIDOR SKOLNIK, Employer; NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier

Claim No. 35021

(Decided September 11, 1916)

Injuries received by Morris Stecklow while employed as a stone cutter by Isidor Skolnik.

On January 7, 1916, while Morris Stecklow was employed as a stone cutter by Isidor Skolnik, he was cutting stone at Greenwich and Duane streets, in the borough of Manhattan, when a brick fell from one of the floors of the building in which he was at work, causing brain concussion and lacerations of the scalp, which became infected, disabling him from work from that date until March 7, 1916. His average weekly wage was the sum of thirty-one dollars and seventy-three cents. An award was made.

Robert W. Bonyngé, Chief Counsel to State Industrial Commission.

Frederick Mellor, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On January 7, 1916, the day when Morris Stecklow received his injuries, he resided at 527 Rockaway avenue, borough of Brooklyn, city of New York, and was employed as a stone cutter by Isidor Skolnik, who was engaged in the business of stone cutting, with a plant and place of business at 119 Hopkins street, borough of Brooklyn, city of New York.

On said date while Morris Stecklow was working for his employer on some stone cutting work which his employer had at Greenwich and Duane streets, borough of Manhattan, city of New York, and while he was engaged in cutting stone in the

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cellar of the building at that place, a brick fell from the floors above and struck Stecklow on the head, thereby causing concussion of the brain and severe laceration of the scalp, and the scalp wound became later infected. By reason of said injuries, Morris Stecklow was disabled from working from the date of the accident until March 7, 1916, a period of eight and two-thirds weeks.

The average weekly wage of Morris Stecklow was the sum of thirty-one dollars and seventy-three cents.

Award of compensation is hereby made against Isidor Skolnik, employer, and New Amsterdam Casualty Company, insurance carrier, to Morris Stecklow, injured employee, at the rate of fifteen dollars weekly for a period of six and two-thirds weeks from January 21, 1916, to March 7, 1916.

In the Matter of the Claim of MINNIE GREENBERG, for Compensation under the Workmen's Compensation Law, for the Death of HARRY GREENBERG, against SIGMUND SPIER, Doing Business under the Name of CANADIAN KNITTING MILLS, Employer; MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier

Claim No. 290

(Decided September 15, 1916)

Injuries received by Harry Greenberg, resulting in his death, while employed as a porter by Sigmund Spier, doing business under the name of Canadian Knitting Mills.

On October 4, 1915, while Harry Greenberg was employed as a porter by Sigmund Spier, who was engaged in business under the name of the Canadian Knitting Mills, he, the claimant, was cleaning a floor about one of the machines, when an arm of the machine swung out and struck him, causing bruises on his hand and chest. He continued to work up to the 18th of October, 1915; pleurisy then developed as a result of his injuries and caused his death on October 18, 1915. His average weekly wage was the sum of eight dollars and sixty-five cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

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Nellis & Nellis, attorneys for employer and insurance carrier.

Morris Wolfman, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On October 4, 1915, the day when Harry Greenberg received the injuries which resulted in his death, he resided at 203 Manhattan avenue, borough of Brooklyn, city of New York, and was employed as a porter by Sigmund Spier, doing business under the name of Canadian Knitting Mills, who was in the business of operating a knitting mill, with a plant and place of business at 86-88 Meserole street, borough of Brooklyn, city of New York.

On said date Harry Greenberg came to the plant to work at 7 o'clock as usual and shortly after he started to work and while he was cleaning up the floor around one of the knitting machines, an arm of the machine swung and hit him on the left hand and left side of the chest, causing bruises and contusions to the hand and chest. He bandaged his hand and continued working, but complained of the injury to his chest to his fellow employees. The accident was on a Monday. He continued working the balance of that week and the whole of the following week up to and including Saturday, October 16, 1915. On the night of his accident he went to his doctor who directed him to go to bed as he was suffering from the shock of the accident. He did not obey the instructions of the doctor, but continued at work as usual and also went to receive treatment from the doctor during the period up to the 16th of October, 1915. On October sixteenth it was found that a traumatic pleurisy had developed as a result of the injury which caused an acute dilatation of the heart and causing his death at 6 p. m. on Monday, October eighteenth.

The average weekly wage of Harry Greenberg was the sum of eight dollars and sixty-five cents.

Harry Greenberg left him surviving his widow, Minnie Greenberg, aged fifty-seven years, the claimant herein, and no child or children under the age of eighteen years.

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Award of compensation is hereby made against Sigmund Spier, doing business under the name of Canadian Knitting Mills, employer, and Massachusetts Bonding and Insurance Company, insurance carrier, to Minnie Greenberg, widow of Herman Greenberg, deceased employee, at the rate of two dollars, fifty-nine and one-half cents weekly during widowhood with two years' compensation in one sum upon remarriage; and to Max Mitchell in the sum of sixty-four dollars and fifty cents, and to Axelrod and Isadore Greenberg in the sum of twenty-three dollars and fifty cents on account of the funeral expenses of Harry Greenberg, deceased.

In the Matter of the Claim of ISABELLE LIBERATORE and Minor Children, for Compensation, under the Workmen's Compensation Law, for the Death of NICOLA LIBERATORE, against KELLY CONSTRUCTION COMPANY, Employer; EMPLOYERS' LIABILITY ASSURANCE CORPORATION, Insurance Carrier

Claim No. 698

(Decided September 15, 1916)

Injuries received by Nicola Liberatore, resulting in his death, while employed as a carpenter's helper by Kelly Construction Company.

On January 17, 1916, while Nicola Liberatore was employed as a carpenter's helper by the Kelly Construction Company, contractors, at Yonkers, N. Y., he remained in the building where he was at work after hours, for the purpose of gathering up loose wood to take home. In descending a ladder, carrying his wood, he fell, fracturing his skull, and killing him instantly. Award denied.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

W. L. Tufts, attorney for employer and insurance carrier.

Salvatore Carone, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Com-

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mission makes its conclusions of fact, ruling of law and award as follows:

On January 17, 1916, the day when Nicola Liberatore received the injuries which resulted in his death, he resided at 166 Willow street, Yonkers, N. Y., and was employed as a carpenter's helper by Kelly Construction Company, a corporation engaged in the general contracting business, with an office at 45 Warburton avenue, Yonkers, N. Y.

On said date the Kelly Construction Company was engaged in putting up a building called the "Getty Square Building" at 101 New Main street, Yonkers, N. Y., and Nicola Liberatore had been working on that building all day. The quitting time was 4:30 P. M. and at 4:30 P. M. most of the men on the job quit work with the exception of a couple of plumbers who were working on the third floor and desired to get some pipes set before quitting for the night, and these men worked a few minutes overtime. After quitting time had been announced, Liberatore proceeded to gather up some loose wood which was lying around the floor and to put the same in a bag for the purpose of conveying it to his own home for his own personal use. The employer had neither authorized nor forbidden such action on his part. The men were sometimes allowed to take loose wood home provided the wood was useless for the purpose of the building operation. The purpose in taking such wood home was for use as firewood. The place where Liberatore was gathering wood was the third floor of the building, the floor on which he had been working all day. This floor was reached by means of a ladder through a stairway well. The well was ten feet by eleven feet and the ladder was about thirty feet long and reached from the ground floor to about five feet above the third floor. The ladder was secured by a rope which prevented the ladder from swinging away from the side of the well, but did not prevent it from slipping from side to side. At about 4:45 P. M., after Liberatore had filled his bag with wood, he proceeded to go down the ladder, carrying his wood, and missed his step and fell to the ground floor, thereby receiving a fractured skull, instantly killing him. At the time of the said

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accident, Nicola Liberatore was not engaged in his employer's business, but was doing work for his own purpose.

The claim of Isabelle Liberatore, widow, and minor children of Nicola Liberatore, deceased employee, against Kelly Construction Company, employer, and Employers' Liability Assurance Corporation, insurance carrier, is hereby denied on the ground that the injuries which resulted in the death of Nicola Liberatore did not arise out of and in the course of his employment.

In the Matter of the Claim of ALFONSO CARRIERO, for Compensation under the Workmen's Compensation Law, against ASTORIA COMPANY, INC., Employer; CASUALTY COMPANY OF AMERICA, Insurance Carrier

Claim No. 29943

(Decided September 15, 1916)

Injuries received by Alfonso Carriero while employed as a laborer by the Astoria Company, Inc.

The claimant alleges that on the 28th of July, 1915, he was injured while employed as a laborer by the Astoria Company, Inc. Carriero claims that while at work on a scaffold he fell backward and hung on by an iron beam until lowered by other laborers, and that he injured his back by the fall. No claim for compensation was filed until nine months after the injury, nor had notice thereof been given to the company. Award denied.

Compensation in this case is resisted by the insurance carrier on the ground that the claimant's disability is not the result of an accident, and on the further ground that if the accident occurred, the insurance carrier was prejudiced by the employee's failure to give notice of the accident to the employer. The accident occurred on the 28th day of July, 1915. The claimant's claim for compensation was verified on April 19, 1916, and filed with the Commission on April 21, 1916. Proof from the superintendent of the employer is, that no notice whatever of the accident was given until about the date of the filing of claim for

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compensation. The claim for compensation describes the accident as follows: "While working on scaffold I fell backward. In falling I hung myself by an iron beam and held myself fast there until other laborers lowered me down."

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

D. Y. Williams and J. W. Richardson, for insurance carrier.

Claimant, in person.

LYON, Commissioner.—This is another case where an accident comparatively insignificant is claimed months afterwards to have resulted in serious injury. While the claimant in his testimony made some claim that he injured his back by the fall, it is to be noticed that his claim for compensation, filed nine months after the injury, makes mention of no such injury, but bases his claim upon the fact that he fell and hung by his hands from an iron beam until rescued. I think it is clear that the accident itself was of no very serious moment. The claimant himself when asked why he did not report it testified as follows: "Q. Why didn't you tell somebody about your accident? A. I thought it was a very slight accident. Q. How long did you work after the accident? A. About two or three days. Q. What did you do after that? A. I went to bed and called a doctor. Q. And still you didn't tell anybody you were hurt? A. I told the doctor I had fallen. Q. But did you tell your boss? A. No, sir. Q. Why not? A. I did not know the law. Q. But didn't you know enough to give your employer some reason for leaving him? A. I told the boss about it. Q. What boss? A. The boss whose name is Charley. Q. When did you tell him? A. I went back to work, I left after 2½ days and then returned to work and couldn't work, and then Charley asked me what's the matter and I told him I was hurt. Q. Did you tell him how you were hurt? A. I just told him I had pains in my arms. Q. Didn't you tell him you fell? A. No."

The superintendent of the employer testified that when the

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claimant left the employment he complained of rheumatism, but made no mention of any injury. The doctor who treated the claimant two or three days after the injury, diagnosed the case as one of rheumatism, but afterwards noticed that there was an abscess forming on the upper part of the clavicle. He lanced it and sent him to a hospital for further treatment. Nick Williams, a workman, who saw the accident testified: "Q. Didn't he complain of being hurt? A. After about ten minutes I asked him if he was hurt, he says, 'A little bit on the shoulder.' He kept on working until 5 o'clock. In the morning he came back again and started to work, it was about eleven or eleven-thirty and he couldn't work no more, unable to work no more."

Pasquale Pallidino, another witness who saw the accident, testified: "Q. Didn't the injured man tell you he wasn't hurt at all? A. He said he was slightly hurt. Q. Slightly hurt? Didn't he tell you that he was suffering from rheumatism? A. No, sir, he said nothing about rheumatism. Q. Made no complaint to you about an injury? A. No, sir. Q. And he didn't tell you why he didn't want to go to work? A. No, sir, he wasn't feeling well and that is why he didn't go."

The hospital record introduced in evidence is dated March eighth, and shows the claimant discharged March twenty-sixth, "condition improved." It then continues: "Tumor or swelling of left clavicle, eight months, discharging sinus near the clavicle juncture and the point of incision was made — has never had much pain — little tenderness, no history of injury. Heart and lungs surgically competent."

Under these circumstances the question naturally arises, can the serious consequences which claimant alleges flowed from this comparatively slight injury be attributed to the injury, and ought the Commission to excuse the failure to give notice of the injury for nine months. There is no claim that written notice was given earlier than April, 1916, and the proofs conclusively show that no notice whatever was given to the employer, unless a somewhat vague verbal notice to a minor superintendent of scaffolding, can be held to be a substantial compliance with the statute, which re-

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quires notice to be given in writing. As already stated, the superintendent for the employer to whom all such notices should of right be given, testified that no notice whatever was received of this injury until at least April, 1916. The workman, through whom the claimant alleges that notice was given to the employer, seems to have been some foreman whose name is not given and who, the evidence shows, left the employ within a day or two after the accident. The claimant gives as a reason for not giving the notice, that he did not know the law, but the witness, Williams, testified as follows: "Q. How do you fix the date in your mind? A. I remember the date when he came over and told me, 'In case we need any witnesses, you have to come down there.' I says, 'All right.' It was on Wednesday. Q. It was on Wednesday? A. Yes, sir, the 28th of July. Q. He told you at that time, 'In case I need witnesses, you will be one of my witnesses?' He told you that right after the accident? A. Yes, sir."

It seems, therefore, that the claimant immediately knew that he might have need of witnesses. I can, therefore, see no reason why if his injury were the cause of the present disability, he should not have in some way informed his employer without waiting for nine months until after his operation in the hospital in March. I am extremely doubtful whether the claimant or any of his friends supposed at the time, or for months afterwards, that his fall on the twenty-eighth day of July was the cause of the serious condition found in his clavicle. In any event, in a case surrounded by so much doubt on this point, the injured man's employer had a right both morally and under the statute to have reasonable opportunity to investigate the case and determine whether there was an injury and its extent, in order to determine whether the serious consequences alleged by the claimant flowed from that accident, and I do not think that this is a case where the Commission ought, in the exercise of its discretion, to overlook the failure to give such notice, and I advise against an award.

On the 15th day of September, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of HERMAN BLENDERMAN, for Compensation under the Workmen's Compensation Law, against CORDING & SALZMAN, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 933

(Decided September 15, 1916)

Injuries received by Herman Blenderman while employed as a driver of a coal wagon by Cording & Salzman.

On June 26, 1916, while Herman Blenderman was employed by Cording & Salzman as a driver of a coal wagon, he was putting coal into the cellar of premises on One Hundred and Twelfth street, when he slipped on the walk, fell on his arm, and sustained a colles fracture of the left wrist and sprained his left elbow, disabling him from work from that date until August 28, 1916. His average weekly wage was the sum of thirteen dollars and ninety-six cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On June 26, 1916, the day when Herman Blenderman received his injuries, he resided at 316 East One Hundred and Twenty-sixth street, borough of Manhattan, city of New York, and was employed as a driver of a coal wagon by Cording & Salzman, a copartnership engaged in the business of coal dealers, with a plant and place of business at One Hundred and Thirty-fifth street and Harlem river, borough of Manhattan, city of New York.

On said date while Herman Blenderman was working for his employer and was engaged in delivering a load of coal into the

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cellar of the premises located at 23 West One Hundred and Twelfth street, New York, he slipped on the sidewalk and fell on his left arm, thereby receiving a colles fracture of the left wrist and a sprain of the left elbow, by reason of which injuries he was disabled from working from the date of the accident until August 28, 1916.

The average weekly wage of Herman Blenderman was the sum of thirteen dollars and ninety-six cents.

Herman Blenderman failed to give written notice of his injury within ten days of his accident but such failure has not prejudiced the employer.

Award of compensation is hereby made against Cording & Salzman, employers, and the Travelers' Insurance Company, insurance carrier, to Herman Blenderman, injured employee, at the rate of nine dollars and thirty-one cents weekly for a period of seven weeks from July 10, 1916, to August 28, 1916.

In the Matter of the Claim of LEONARDO RENDA, for Compensation under the Workmen's Compensation Law, against VINCENZO OCCIUZZO, Employer

Claim No. 30507

(Decided September 15, 1916)

Application by claimant for reopening case so as to substitute Guiseppe Tobia in place of Vincenzo Occiuzzo as employer.

Leonardo Renda, on July 2, 1915, sustained injuries while employed by Vincenzo Occiuzzo in the latter's bakery in Brooklyn. As a result of the hearings had when the matter came up for hearing, the Commission found that the claimant had lost the use of his hand and awarded compensation amounting in all to \$1,798.29, and instructed its legal department to collect the award, as the employer had no insurance. Suit is now pending upon this claim; Occiuzzo has no means, and this fact having developed, the claimant now applies to the Commission for a rehearing upon the ground that Guiseppe Tobia was his employer and not Vincenzo Occiuzzo. Application denied, as it appears that Tobia had sold the business to Occiuzzo prior to the accident.

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LYON, Commissioner.—The claimant received an injury on July 2, 1915, at No. 182 Johnson avenue, Brooklyn. His first notice of injury was dated July 31, 1915, and gave as the name of his employer, Guiseppe Tobia. This notice of injury has the date, July thirty-first, crossed out with a pen and the date, August eighteenth, is written over it. The name of the employer is also crossed out and Vincenzo Occiuzzo written over it, and in that form appears in our files. The employer's first notice of injury is dated September fourteenth, and is signed by Occiuzzo, and in that he admits that he is the employer. He also admitted in his testimony before the Commission that he was the employer of the claimant. The employee's claim for compensation was verified on September nineteenth, and in that he also states that his employer was Vincenzo Occiuzzo.

On these papers the matter came on for a hearing, and after one or two awards had been made against Occiuzzo, the Commission, on February 25, 1916, rescinded the prior awards and found that the claimant had lost the use of his hand and gave compensation for 244 weeks at \$7.37 per week, amounting in all to \$1,798.28, and the legal department was instructed, inasmuch as there was no insurance in the case, to begin proceedings for the collection of this award. Suit has been commenced upon it and is now pending. It appears that Occiuzzo is a man of no means and there is little likelihood of collecting from him. This being the situation the claimant applied to the Commission for a rehearing, alleging that his employer, instead of being Occiuzzo, is Guiseppe Tobia. Mr. Tobia appeared before the Commission, and testified, that while he at one time owned the business where the claimant was injured, he sold the same to Occiuzzo in April or May, 1916, taking in payment for the most part, notes secured by a chattel mortgage. He further testified that the matter stood in that condition until about the middle of July, which was two weeks subsequent to the injury of the claimant, when finding that Occiuzzo could not make payment and take up any of the notes, he voluntarily took back the business, surrendered the notes and the chattel mortgage, and within a day or two made a similar

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transfer of it to Guiseppe Parrino, and that the notes secured by a chattel mortgage on this second sale are now in a bank, which had accepted them from him for discount. In substantiation of his statement, he produced and filed with the Commission a copy of the bill of sale last mentioned and produced at the hearing one Louis Tavornina, a notary public, who testified that he is a real estate and steamship ticket agent and that he drew the papers on the transfer of the bakery from Tobia to Occiuzzo in April, 1915; and that in July he was present when the transaction with Occiuzzo was rescinded and likewise prepared the papers on the transfer to Parrino. The claimant attempted to give some testimony showing that Mr. Tobia exercised some ownership over the premises during the time when the title was in the name of Occiuzzo, but the proofs offered were not convincing and amounted to little more than proof that Tobia kept an eye on the progress of the bakery for the purpose of seeing whether the purchase price was secure and likely to be paid. There is no convincing proof that the statements made by Mr. Tobia and the real estate agent do not represent the exact situation, and this coupled with the fact that for many months the claimant asserted that Occiuzzo was his employer, and backed up the assertion by proofs sufficient to warrant an award made months ago, and that the claim that Tobia was the owner seems to have only been made when it became apparent that Occiuzzo was financially irresponsible, convinces me that the award already made is correct, and that the claim made against Mr. Tobia should be dismissed, and I therefore advise that the application to open the matter be denied.

On the 15th day of September, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of CHARLES LEE, for Compensation under the Workmen's Compensation Law, against M. P. SMITH & SONS COMPANY, Employer; MANUFACTURERS' LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 20047

(Decided September 15, 1916)

Injuries received by Charles Lee while employed as a stevedore by M. P. Smith & Sons Company.

On April 18, 1916, about 10:30 P. M., Charles Lee, while employed as a stevedore by M. P. Smith & Sons Company, loading a ship anchored at a dock, attempted to leap from the dock to the ship, but slipped and fell down between the pier and the ship. A gangway ran from the dock to the ship, at some little distance from the place where the accident occurred, intended to be used by persons boarding and leaving the ship. It was customary, however, for the workmen to jump aboard the ship without reference to this gangway. An award was made.

The claimant was injured on the night of the 18th day of April, 1916, at about 10:30 or shortly thereafter. He had been assisting as stevedore upon a ship anchored at a dock. The claimant's statement of the cause of his accident is that the notice to quit having been given, it was necessary to do something relative to the skid, which was a wide piece of planking used to prevent merchandise from falling into the water when being taken into or out of the ship. He says that he had a strap or rope in his hand and attempted to put the same underneath the skid. He stepped upon the latter and it tilted, throwing him into the water. The employer denies this statement and states, in answer to a request of how the accident occurred: "Climbed over the side of the ship and attempted to straddle the dock, slipped and fell down between the pier and the ship. (Absolutely his own fault.) The gang knocked off at 10:40 P. M. and was supposed to go home, but Lee stayed back."

There was a gangway connected with the ship at some little distance from the place where the accident occurred, which was designed to be used by persons entering or leaving the ship, and

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there is evidence that workmen had been told repeatedly to use this gangway. The employer and insurance carrier resist the claim on the ground that either the claimant was injured while disobeying orders or after he had left his employment.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Claimant in person.

John Purdon and A. W. Parsons, for insurance carrier.

LYON, Commissioner.— If the claimant's statement that he was injured while assisting to handle the skid is true, and in this he is supported by one or two of the witnesses, there can be no question whatever but that he is entitled to compensation, and the insurance carrier in that view of the case probably would not question the award. On careful review, however, of the testimony and of the adjudicated cases, I am clearly of the opinion that he is entitled to compensation even on the statement of the employer and the witnesses called by the insurance carrier. It must be conceded, I think, that Lee when he was injured had not left the plant of the employer even on the employer's statement of the case, but was in the act of leaving the plant when he was hurt. The case is, therefore, clearly distinguishable in this respect from the Hotaling case decided by this Commission and referred to in the insurance carrier's brief, as well as the other cases cited by the insurance carrier. So far as I am aware all commissions and courts have given the injured workman the benefit of compensation where an injury has resulted while he was in the act of leaving the employment. In this aspect of the case I think the representatives of the insurance carrier have not given due consideration to the exact wording of our law and the difference between it and some of the other compensation acts. There can be no question but that if Mr. Lee's right to compensation depended in any degree upon the common-law rules of negligence he could not succeed. There was a perfectly safe method for him to leave the ship and he voluntarily chose to leave it, according to the employer's witnesses, by a way which turned out to be dangerous. He was, therefore,

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undoubtedly guilty of contributory negligence and there does not seem to be anything in the case to show that the employer was guilty of negligence. These considerations, however, are entirely eliminated from the case by the provisions of section 10 of the act, which provide that in a proper case an injured workman shall receive compensation "without regard to fault as a cause of such injury." There remains to consider only the point made by the insurance carrier that Lee lost the benefit of the act because of his disobedience to orders. I am not very greatly impressed by this argument. In the first place it does not seem to me that such orders were given him as are contemplated by the cases cited by the insurance carrier. The particular order, which it is claimed Lee violated, is, according to the witness Davidson, "I warned him and told him about taking the gangway, not on this occasion but on a good many occasions; as a rule the men don't take any notice of that until something happens, I have warned him time and time again." And again he says, in describing how the so-called direction was obeyed by the men, "it was the night of the 18th, about twenty after ten, the ship was finished and the foreman of the hatch called the men off the deck; he says, 'Boys, come and give a hand so all will be finished at 10:30.' I was standing on the dock adverse to the hatch a little before this, the skid was lying on the dock. I warned everybody to keep away from the skid; in the meantime they were taking the skid aboard; the skid in going up, the skid went aloft, we took it over the guide and took it aboard that way; all hands ashore had given in their time; to get off the ship the men had to take a set of steps, to go on the bridge deck and down 25 feet, down the gangway, to step ashore. Instead of doing that some of these fellows came right across, the ship was loaded and several of the men had come ashore, I had in the neighborhood of six or seven men's time already turned into me, it was then about twenty of eleven exact time. After I had taken about six or eight of these men's time and entered it into the book, I suddenly heard them say, 'There is a man overboard.'"

I think that in the ordinary case, for an insurance carrier to rely on disobedience to orders as a bar to compensation, the orders

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should be those regularly promulgated, shown to have been known to the employees and enforced with reasonable strictness. I think the English cases cited by the insurance carrier are not adverse to this position. The English statute apparently makes willful misconduct ground for denying compensation. Our statute, on the contrary, contains no such provision. It is apparent that the workmen on board these ships at the dock, notwithstanding warnings to use the ordinary means of reaching shore, continually pass from the deck of the ships to the dock where it can be done by a single step without making use of the means so provided. In fact, unless workmen are positively and strictly forbidden to do so, it seems that in the haste of ordinary business, they would be continually doing it, and the evidence is that the men not infrequently and without reproof, made use of this means of passing from the ship to the dock and from the dock to the ship. I do not think that Lee in attempting to jump from the ship to the dock, if the employer's view of the facts is correct, violated such a positive order as ought to bar him from compensation, and I advise an award.

On the 15th day of September, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of ELIZABETH POPE, Widow, and WILLIAM CHAMBERS, Dependent Grandson, for Compensation under the Workmen's Compensation Law, for the Death of JOHN POPE, against MERRITT & CHAPMAN DERRICK AND WRECKING COMPANY, Employer; NEW AMSTERDAM CASUALTY COMPANY, Insurance Carrier

Claim No. 754

(Decided September 15, 1916)

Injuries received by John Pope, resulting in his death, while employed by Merritt & Chapman Derrick and Wrecking Company.

On February 19, 1916, while John Pope was employed as a diver's attendant by the Merritt & Chapman Derrick and Wrecking Company,

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he was assisting in the laying of water pipes under the Narrows, between Brooklyn and Staten Island. He was employed to assist one of the divers on a floating derrick, but, having come to work intoxicated, he was not allowed by the diver to assist. Sometime later Pope entered a small boat belonging to the derrick, to be taken to a trestle connected with the shore. That was at night. In the morning his body was found drowned in a trench under the trestle. An award was made upon the ground that the trestle was part of the employer's plant, and that deceased was not completely out of his employment while walking thereon. His average weekly wage was the sum of fifteen dollars and ninety-six cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

George W. Pensinger, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On February 19, 1916, the day when John Pope received the injuries which resulted in his death, he resided at 26 Dove street, Stapleton, borough of Richmond, city of New York, and was employed as a diver's attendant by Merritt & Chapman Derrick and Wrecking Company, a corporation engaged in the business of marine wrecking, harbor lightering and transportation, with an office at 17 Battery place, borough of Manhattan, city of New York. The said company had a contract for the laying of water pipes under the Narrows, in New York Harbor between Brooklyn and Staten Island, and on said date were working in the performance of that contract and John Pope was one of the employees on that work. The pipe had been laid across the Narrows almost to the Staten Island shore. A trestle had been built out from the said shore for a distance of about one hundred feet, under which the company was excavating, at a depth of some fifty feet, a trench in which the pipes were to be laid. This trestle contained rails on its upper surface and also a string board walk, the board walk one board wide touching end to end. About seventy-five feet

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from the end of the said trestle a floating derrick was stationed. From this derrick the divers went down into the water to do the work necessary at that spot, and John Pope's duties consisted of attending one of the divers on this derrick. He was to dress the diver properly in his diving equipment and to assist him in entering the water, and to watch his ropes and signals while the diver was in the water, and to assist the diver out of the water and in relieving himself of his equipment after the work was completed. His shift was from 4 to 12 p. m. There was a small boat belonging to the derrick which was used by the men in going from the derrick to land, and the men frequently made the trip to land by rowing from the derrick to the trestle and then proceeding along the trestle to land; another method was to go directly from the derrick into shore. Both methods of transit were used and were known to be so used by the employer.

On said date at about 4 p. m. John Pope came to his work as usual and attended the diver until supper time, namely, about 8 p. m. when the diver came out of the water. Pope then went ashore for supper at about 8 p. m. and after supper returned to the derrick in an intoxicated condition. His diver refused to let him assist in the operations of the night and the captain took John Pope's place and prepared the diver for entering the water and attended to him while in the water. In the meantime he had Pope locked up in the forecastle, which precaution was made necessary by Pope's condition of intoxication, it being the fear of the captain that on account of the amount of ice on the dock, Pope might fall into the water. The thermometer was about thirty degrees Fahrenheit that night. The diver came up out of the water shortly after 11 p. m. and Pope had come out of the forecastle and insisted upon attending the diver in his disrobing but was not allowed to do so by the diver and the captain. At about 11:30 p. m. one of the other employees on the derrick was about to proceed to shore in the customary boat and John Pope got into the boat with him, and asked to be rowed to shore. The purpose of the said employee going to shore was to pick up the night watchman who had called for the boat from the end of the trestle. The said employee conveyed Pope to the trestle and put Pope on to

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the trestle and took aboard the night watchman. Pope proceeded along the trestle and one of the men in the row-boat called to him and asked if he was all right. He replied that he was. That was the last that was seen or heard of John Pope alive. The next morning his dead body was found in the trench under the trestle, and his death was caused by submersion. On the night of February 19, 1916, John Pope had fallen through the trestle by accident and had been thereby caused to drown in the water underneath the trestle.

The injuries which resulted in the death of John Pope were accidental injuries, and arose out of and in the course of his employment, and were not occasioned solely by the intoxication of John Pope while on duty, and were not caused by the willful intention of John Pope to bring about an injury to himself; but were partially the result of the inadequacy of the surface of the trestle as a place on which to walk during the night time.

The average weekly wage of John Pope was the sum of fifteen dollars and ninety-six cents.

John Pope left him surviving his widow, Elizabeth Pope, aged fifty-six years, the claimant herein, and no child or children under the age of eighteen years. John Pope also left him surviving his grandson, William Chambers, aged sixteen years, who was dependent upon him for support at the time of the said accident.

Due notice of death was given to the employer.

Award of compensation is hereby made against Merritt & Chapman Derrick and Wrecking Company, employer, and New Amsterdam Casualty Company, insurance carrier, to the widow and dependent grandson of John Pope, deceased employee, as follows: to Elizabeth Pope, widow, aged fifty-six years, at the rate of four dollars, seventy-eight and eight-tenths cents weekly during widowhood with two years' compensation in one sum upon remarriage; and to William Chambers, dependent grandson, aged sixteen years, at the rate of three dollars, thirty-five and four-tenths cents weekly during dependency and not beyond the date on which he shall arrive at eighteen years of age; and to Elizabeth Pope in the sum of one hundred dollars on account of the funeral expenses (paid by her) of John Pope, deceased.

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In the Matter of the Claim of JOHN P. KAEMPFER, for Compensation under the Workmen's Compensation Law, against AUTOMOBILE CLUB OF AMERICA, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 50154

(Decided September 15, 1916)

Injuries received by John P. Kaempfer while employed as a machinist by the Automobile Club of America.

On the 11th day of December, 1915, while John P. Kaempfer was at work at his employment as a machinist at the machine shop conducted by the Automobile Club of America in the city of New York, he was cranking an automobile when it back-fired breaking his right arm above the wrist. An examination made on June sixth showed a marked diminution in grasping and lifting power due to the fracture which had long since healed. A subsequent examination showed that the deformity in the arm was permanent. Question raised as to whether the Automobile Club of America is a membership corporation. *Held*, that so far as the running of the machine shop is concerned the club is covered by the act. An award was made.

The claimant was injured on the 11th day of December, 1915, while in the employ of the Automobile Club of America in its machine shop at Fifty-fourth and Fifty-fifth streets in the city of New York. The employee's first report of the injury gave as his injury, the following: "Was cranking an automobile when it back-fired breaking my right arm above the wrist. Both bones of right arm broken above wrist." An examination by the Commission's medical department, under date of April twenty-second, contains the following statement: "Examination shows evidence of a fracture, lower end of radius and ulna, right hand. There is marked curvature and deformity, and an anterior displacement of the epiphysis of these bones, with a consequent impairment of power in muscles. There is marked limitation in supination of his forearm, claimant being unable to supinate more than about 25 per cent." And under date of June sixth, our medical examiner

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stated, as follows: "Examination today shows there is marked diminution in grasping and lifting power due to fracture which is long since healed." Under date of August fourth, the Department's medical examiner reported, as follows: "Examination today confirms report of examination dated June 9th. Claimant's present condition will last for a long period of time, and the deformity is permanent. There is consequently a diminution in grasping power and claimant is entitled to a partial disability commensurate with his impaired earning powers. Manometer reading 80 injured hand; other hand — 110." It will thus be seen that the claimant sustained a rather serious injury. In fact, awards have been made, and the insurance carrier has paid them extending over the period of December 25, 1915, to August 14, 1916, for a portion of the time for full compensation, and for a portion of the time for reduced earning power. The case coming on for further consideration, the insurance carrier now claims that the case is not compensatable and bases its objection solely upon the proposition that the employer, Automobile Club of America, is not in a "business or occupation carried on by the employer for pecuniary gain." § 3, subd. 5. This is the only question calling for consideration by the Commission at this time.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Claimant in person.

Valentine Ahern, for insurance carrier.

LYON, Commissioner.— The insurance carrier bases its opposition to the claim upon the proposition that the Automobile Club of America is a membership corporation having no capital stock and formed for purposes quite other than those of pecuniary gain, and in support of its contention it has put in evidence the year book of the Automobile Club of America for the year 1915, containing a copy of its certificate of incorporation, its constitution and by-laws, and a considerable amount of information relative

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to the activities of the club. It is quite true that the certificate of incorporation is filed under the provisions of the Membership Corporation Law and that none of the objects of the corporation, as set forth in the certificate of incorporation, would seem to indicate that the promotion of pecuniary gain is one of the objects of the incorporation. The question still remains, however, whether, notwithstanding that it has not the legal power to operate for pecuniary gain, it may not be in fact accomplishing that same purpose, and whether if it be, it can escape the usual consequences of such activities. The year book offered in evidence, already referred to, contains the following information under the heading, "The Automobile Club of America, its Objects, Characteristics and Advantages."

"6. To protect its members and support them in the defense of their rights, and to protect the interests of owners and users of automobiles, motor boats and flying machines against unjust or unreasonable legislation, and to maintain the lawful rights and privileges of owners or users of all forms of self-propelled pleasure vehicles whenever and wherever such right and privileges are menaced."

"11. It provides:

(a) A specially designed modern club-house and garage, costing a million and a half dollars, situated West of Broadway, New York, with eight stories on 54th Street and twelve stories on 55th Street, providing an area of 18,825 square feet for club rooms and members' social uses and an area of 206,367 square feet for machine shop, supply store, Touring Department and garage uses, wherein members' cars may be stored, with adequate club rooms, committee rooms, restaurant, cafe, billiard room and ladies' parlor.

(b) An up-to-date, commodious, fully equipped machine shop, with skilled machinists, occupying two floors of the club building.

(c) A supply department in the club building where members may purchase all automobile accessories and supplies at an assured minimum cost."

The same book contains, under the heading "Supply Department," the following:

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"The Club Supply Department carries an extensive stock of automobile accessories. There is on hand, a complete line of all standard makes of tires and tubes, and a great variety of chauffeurs' clothing, automobile clocks and watches, etc. When members wish articles that are not in stock, our purchasing plan is such that they can be quickly secured. The department is able, therefore, to supply promptly any article manufactured for automobile purposes. Prices are as low as is consistent with first-class merchandise."

The book also contains a cut showing a quite extensive machine shop fitted out with a number of intricate power driven machines, and then proceeds to describe the machine shop, as follows:

"CLUB MACHINE SHOP AND REPAIR DEPARTMENT"

"The Club Machine Shop and Repair Department occupies the two upper floors of the Club building, which are light and commodious. Its use is restricted to members of the Club, and it affords the best possible facilities for work of the highest class. It is prepared to undertake any class of repair, construction or experimental work.

"The Shop is equipped with electrically driven tools and machinery of the latest modern design. It is provided with electric fans, with flues passing through the roof, which insure excellent ventilation and carry off the exhausts during tests of motors.

"There is a forge room, with fireproof walls, amply ventilated, and provided with annealing ovens, forges and complete equipment for these processes.

"The Machine Shop and Repair Department was designed especially for the convenience and advantage of members. A portion of its space is therefore set apart for the use of members' chauffeurs. A special Repair Room with every facility, including a well-equipped tool room and individual work bench, is at their disposal, in which they may perform such work as may be desired upon their owners' cars.

"An eminent English authority, who inspected the Shop, stated that it is probably the best equipped Machine Shop for the purpose in the world."

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The president's annual report appearing in the same book, contains the following: "Despite the unsettled business conditions, the club has had a prosperous year. The sum of \$10,000 has been written off for depreciation of the club buildings, in addition to the usual depreciation of the equipment, furniture and fixtures. \$5,300 in initiation fees is available for the retirement of second mortgage bonds; \$5,000 set up as a reserve for contingencies that may arise during the coming year and after these deductions there remains as net profit on the year's operation of \$22,902.31." And in conclusion the president says: "Attention is again called to the fact that the Service Departments of the club are conducted on a strictly non-commission basis. While the service during the last year, as a rule, has met the approval of the members, it is to be expected there would be some criticism where there is such a large volume of business as is carried on in the Supply Department, where nearly \$700,000 worth of automobile accessories were sold last year; or in the Garages of the club that have a total capacity of over one thousand cars; or yet, again, in the Mechanical Department where as many as sixty mechanics are employed at one time."

It appears that the machine shop connected with the club occupies two floors with an area, each floor, of about 50 by 100 feet. The ammountant for the club was called and testified, as follows: "Q. In that place you repair and overhaul machines of your members? A. Yes, sir. Q. Any work for anybody else? A. No, sir, only members. Q. You charge them according to the amount of work done A. Exactly. Q. How many men do you employ there? A. Just at the present time I guess we have about twenty-five. Q. And was Kaempfer one of those men when he was hurt? A. I don't know the gentleman. This is the first time I heard of the case this morning here, just called into it. Com. Lyon: (addressing claimant) As a matter of fact, you were employed, Mr. Kaempfer, in the machine shop? A. Yes. Mr. Ahern: We don't question that at all. * * * Q. Have you any idea how much they make net a year out of this machine shop? A. Just at the present time it is being run at a loss. Q. They have been making some money out of it I take it? A.

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Yes, they make a small profit. Q. Why running at a loss just now? A. They are running at a loss in the machine shop just now? Q. Why? A. Principally on account of the strike we had up there. Q. But the idea is that their machine shop will pay some profit, isn't it; they don't expect to run it just to make ends meet? A. Practically that is the idea, just a very minimum amount of profit. Q. Do you know whether your rates for repairing machines are any different from the ordinary machine shop? A. The price we charge for labor is practically the same, but we do make a concession on the material; I think we put out the material on the machine more reasonable than they would on the street. Q. But the amount that you charge your members for workmen's and helpers' time is practically the same as other people charge? A. Yes, I think it is the regular rate. Q. You probably pay your men about the same too. * * * Q. This profit you say you make, about what percentage of profit would you make on fixing a man's car where you charge the minimum, where you make the actual charge for the labor and make him a small charge for the material, where would you get any profit in that, Mr. Brown? A. The only thing would be between what we pay the men and the rate per hour we charge. * * * Chairman Mitchell: * * * Q. The charge against the members whose cars are repaired per hour, is more than is paid the workman per hour? Mr. Brown: Yes. Chairman: The same as any other garage I suppose; you charge current rates for repairs? Mr. Brown: Yes, I suppose current rates, yes. Chairman: And you pay current rates for labor, is that correct? Mr. Brown: Yes."

This club then, in effect, operates a garage and machine shop precisely as any garage or machine shop would be conducted by a private individual for personal gain. It buys and sells large quantities of material at a profit; it does an immense business in the repair of automobiles, charging a profit on the materials used, hiring a large number of men for one price and charging the owner of the automobile a larger price for the men's services, out of all of which it is paying off some obligation to the club and accumulating a very considerable profit throughout the year.

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It is undisputed that the claimant was injured in the regular course of his employment in this machine shop and that he worked under precisely the same hazard as other workmen in similar machine shops carried on by private individuals. There would, therefore, seem to be every reason for holding that the claimant is entitled to compensation for his injury unless the statute forbids it. It is quite evident that the question is not without its difficulties. No doubt the owner of an automobile might have a private repair shop of his own, where he or his own chauffeur could make repairs to his own car, and such repair shop would not be held to come within the Compensation Law, owing to the provision relative to pecuniary gain. It is probably true that two or more owners of cars might operate a private garage in the same way, but when it comes to a proposition of a very large number of such owners, establishing a regular machine shop, hiring men for no other purpose than repairs, charging a profit on the men's labor, as well as upon the material used, and using that profit to pay off the underlying expense of establishing a machine shop itself, the proposition seems to come at least within the spirit of the law, if it does not within the letter.

The fact that the Automobile Club of America is formed under a charter which does not give it the right to operate for pecuniary gain, to my mind, is not controlling if it be found, as I think it must be, that it is in fact operating a portion of its plant for pecuniary gain.

It is also worthy of note that the club itself and the insurance carrier both seem to have proceeded on the assumption that its employees were covered by the act, and this is emphasized by the fact that for many months the insurance carrier acquiesced in that view of the situation. I advise that the awards be continued to the claimant on the basis of reduced earning capacity during the remainder of his disability.

On the 15th day of September, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of ANTONY VOEGTLE, for Compensation under the Workmen's Compensation Law, against Wm. STEINER SONS & Co., Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE Co., LTD., Insurance Carrier

Claim No. 35799

(Decided September 21, 1916)

Injuries received by Antony Voegtle while employed as a night watchman by Wm. Steiner Sons & Co.

On June 9, 1916, while Antony Voegtle was at work for his employer, Wm. Steiner Sons & Co., as a night watchman, he was making his rounds when he slipped on his way down a stairway, fell and thereby sustained a femoral hernia disabling him from work from that date until July 31, 1916. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On June 9, 1916, the day when Antony Voegtle received his injuries, he resided at 59 Twenty-sixth street, Guttenberg, N. J., and was employed as a night watchman by Wm. Steiner Sons & Co., who were in the lithographing business, with a plant and place of business at 267 West Seventeenth street, borough of Manhattan, city of New York.

On the said date at about 9 p. m. while Anthony Voegtle was working for his employer at his employer's plant and was engaged in making his hourly round of the building, he slipped on his way

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down the east stairway and fell and received thereby a femoral hernia, by reason of which injury he was disabled from working from the date of the accident until July 31, 1916, a period of seven and one-third weeks.

The average weekly wage of Antony Voegtle was the sum of fourteen dollars and forty-two cents.

Antony Voegtle gave to his employer due notice of injury.

Award of compensation is hereby made against Wm. Steiner Sons & Co., employer, and Zurich General Accident and Liability Insurance Company, Ltd., insurance carrier, to Antony Voegtle, injured employee, at the rate of nine dollars and sixty-one cents weekly for a period of five and one-third weeks from June 24, 1916, to July 31, 1916.

In the Matter of the Claim of NORA DENoyer and Minor Children, for Compensation under the Workmen's Compensation Law, for the Death of JOSEPH E. DENoyer, against D. B. CAVANAUGH, Employer; MASSACHUSETTS BONDING AND INSURANCE COMPANY, Insurance Carrier

Claim No. 1472

(Decided September 28, 1916)

Injuries received by Joseph E. DeNoyer, resulting in his death, while employer as a truck driver by D. B. Cavanaugh.

On July 21, 1916, while Joseph E. DeNoyer was employed as a truck driver by D. B. Cavanaugh, a truckman, in the city of Syracuse, N. Y., he was carrying a can of gasoline into a store where he was to deliver it when the gasoline exploded and he sustained injuries resulting in his death on July 27, 1916. His average weekly wage was the sum of twelve dollars and fifty cents. An award was made.

Robert W. Bonynges, Chief Counsel to State Industrial Commission.

Cannon, Spencer & Mitchell, attorneys for employer and insurance carrier.

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BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On July 21, 1916, the day when Joseph E. DeNoyer received the injuries which resulted in his death, he resided at Syracuse, N. Y., and was employed as a driver of a truck by D. B. Cavanaugh who was in the trucking business, with a place of business at 216 West Jefferson street, Syracuse, N. Y. In Syracuse there was a company, namely, Crown Oil Company, which was engaged in the business of selling oil and gasoline. Cavanaugh made an arrangement with them by which he was to furnish the company a horse and driver to be used in connection with a tank wagon owned by the company for the delivery of oil and gasoline, and Joseph E. DeNoyer was used by Cavanaugh for the purpose of operating that vehicle. It was while operating such vehicle that the following mentioned accident occurred.

On said date while Joseph E. DeNoyer was working for his employer and while he was engaged in delivering a can of gasoline from the gasoline truck of Crown Oil Company, which he was then engaged in delivering, to a store at 710 Grape street, Syracuse, N. Y., and while he was carrying the said can of gasoline into the store, the gasoline exploded and his clothes took fire, causing second degree burns of the lower half of the body and of both hands and singeing his face. Thereafter a toxemia developed, due to absorption from the burns, and caused his death on July 27, 1916.

The average weekly wage of Joseph E. DeNoyer was the sum of twelve dollars and fifty cents.

Joseph E. DeNoyer left him surviving his widow, Nora DeNoyer, aged thirty-three years; his daughter, Julia C. DeNoyer, aged five years; his son, John E. DeNoyer, aged three years; and his son, William F. DeNoyer, aged six months, the claimants herein, and no other child or children under the age of eighteen years.

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Due notice of injury and due notice of death was given to the employer.

Award of compensation is hereby made against D. B. Cavanaugh, employer, and Massachusetts Bonding and Insurance Company, insurance carrier, to the widow and minor children of Joseph E. DeNoyer, deceased employee, as follows: to Nora DeNoyer, widow, aged thirty-three years, at the rate of three dollars and seventy-five cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Julia C. DeNoyer, daughter, aged five years; and to John E. DeNoyer, son, aged three years; and to William F. DeNoyer, son, aged six months, at the rate of one dollar and twenty-five cents weekly until they shall respectively arrive at the age of eighteen years; and to Henry McCarthy, undertaker, in the sum of one hundred dollars on account of the funeral expenses of Joseph E. DeNoyer, deceased.

In the Matter of the Claim of MARY RIEDEL and Minor Children,
for Compensation under the Workmen's Compensation Law,
for the Death of CHARLES RIEDEL, against MALLORY STEAMSHIP COMPANY, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 642

(Decided September 29, 1916)

Injuries received by Charles Riedel, resulting in his death, while employed as a night watchman by the Mallory Steamship Company.

On January 3, 1916, while Charles Riedel was employed as a night watchman of Pier 38, North river, New York city, by the Mallory Steamship Company, he was at the place where his duties called him when last seen alive which was about 9 P. M. of that day and was never seen again until his body was found in the North river on April 25, 1916, a few blocks away. His death was due to drowning. There was no way for him to leave the pier except through a guarded gateway and through that gate he did not pass that night. His average weekly wage was the sum of eleven dollars and fifty-four cents. An award was made.

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Robert W. Bonyngé, Chief Counsel to State Industrial Commission.

Amos H. Stephens, attorney for employer and insurance carrier.

Benjamin Ammermann, attorney for claimants.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, award and decision as follows:

On January 3, 1916, the day when Charles Riedel was drowned, he resided at 346 West Twelfth street, borough of Manhattan, city of New York, and was employed as a night watchman of pier 38, North river, by Mallory Steamship Company, a corporation engaged in the operation of steamships in interstate commerce.

On said date Mallory Steamship Company was building an extension to its pier. It was the duty of Charles Riedel to watch the end of the pier at night. That particular night was a very stormy one and there was no covering over the end of the pier where the construction work was carried on during the day time. Riedel went to work between 5 and 6 o'clock in the evening and was last seen on the pier at the end where his place of duty was at about 9.10 p. m. He was never seen alive again and his body was recovered from the Hudson river on April 25, 1916, a few blocks away from pier 38. His death was caused by drowning. There was no way for him to leave the pier except by passing through a gate, at which gate there was stationed a watchman whose only duty was to ring up time at a clock near the gate. The gate was constantly kept closed. Charles Riedel did not pass out through that gate on the evening of the night of January 3, 1916, or the morning of January 4, 1916. Charles Riedel could have left the pier by means of boarding a boat in the river but there was no duty which required him to board any boat. Charles Riedel accidentally fell into the river on the night of January 3, 1916, and was drowned.

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The average weekly wage of Charles Riedel was the sum of eleven dollars and fifty-four cents.

Charles Riedel left him surviving his widow, Mary Riedel, aged forty-one years; his son, Charles Riedel, aged seventeen years; his daughter, Helen Riedel, aged nine years; his son, John Riedel, aged seven years; and his son, Bernhard Riedel, aged five years, the claimants herein, and no other child or children under the age of eighteen years.

Due notice of death was given to the employer.

The services herein of Benjamin Ammermann, counsel for the claimant, are reasonably worth the sum of \$250.

Award of compensation is hereby made against Mallory Steamship Company, employer, and the Travelers' Insurance Company, insurance carrier, to the widow and minor children of Charles Riedel, deceased employee, as follows: to Mary Riedel, widow, aged forty-one years, at the rate of three dollars forty-six and one-half cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Charles, son, aged seventeen years; and to Helen, daughter, aged nine years; and to John, son, aged seven years; and to Bernhard, son, aged five years, at the rate of one dollar and five and eight-tenths cents weekly, each, until they shall respectively arrive at the age of eighteen years; and if the payments to any one of the said children shall cease by operation of law or otherwise, then the payments to the remaining children shall be increased to the sum of one dollar and fifteen and four-tenths cents each, for the period above mentioned, said payments to commence as of January 3, 1916, the date of the death of Charles Riedel; and to Richard J. Delaney, in the sum of one hundred dollars on account of the funeral expenses of Charles Riedel, deceased.

An allowance of two hundred and fifty dollars as counsel fee herein is hereby made to Benjamin Ammermann, Esq., the attorney for the claimants, and the same is hereby declared to be a lien upon the compensation due said claimants and payment thereof shall be made therefrom.

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In the Matter of the Claim of LORENZO MALANZONA, for Compensation under the Workmen's Compensation Law, against UTICA STEAM AND MOHAWK VALLEY COTTON MILLS, Employer; AMERICAN MUTUAL COMPENSATION INSURANCE COMPANY, Insurance Carrier

Claim No. 18315

(Decided October 16, 1916)

Injuries received by Lorenzo Malanzona while employed as a fireman by the Utica Steam and Mohawk Valley Cotton Mills.

On March 15, 1916, while Lorenzo Malanzona was employed as a fireman by the Utica Steam and Mohawk Valley Cotton Mills, in the city of Utica, he was loading coal into a furnace when he suffered a strain on the right side by reason of the heavy lifting he was compelled to do. His average weekly wage was the sum of fifteen dollars and seventeen cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Jeremiah F. Connor, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On March 15, 1916, the day when Lorenzo Malanzona received his injuries, he resided at 757 Lansing street, Utica, N. Y., and was employed as a fireman in the boiler room by Utica Steam and Mohawk Valley Cotton Mills, a corporation engaged in the business of manufacturing cotton goods, with a plant and place of business on State street, Utica, N. Y.

On said date Lorenzo Malanzona had been instructed by the employer to shovel some ice away from the door of the boiler room and when he had finished that work, he was instructed to

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load coal into a furnace. This was not the furnace on which he usually worked but was a much larger furnace and required a much greater effort in lifting the coal as the shovel was larger and was capable of holding more coal. At about 11.30 A. M. while performing this work on the larger boiler, he suffered a severe sudden strain on his right side at the hip by reason of the heavy lifting which he was compelled to do and he was immediately disabled from working and continued to be so disabled from the date of the accident until August 2, 1916. The cause of his disability was a gluteal condition which resulted from the said strain of over-lifting.

The average weekly wage of Lorenzo Malanzona was the sum of fifteen dollars and seventeen cents.

Due notice of injury was given to the employer by the employee.

Award of compensation is hereby made against Utica Steam and Mohawk Valley Cotton Mills, employer, and American Mutual Compensation Insurance Company, insurance carrier, to Lorenzo Malanzona, injured employee, at the rate of ten dollars and twelve cents weekly for a period of eighteen weeks from March 29, 1916, to August 2, 1916.

In the Matter of the Claim of CHARLOTTE JACKSON, and Minor Child, for Compensation under the Workmen's Compensation Law, for the Death of LOUIS JACKSON, against The A. SHERMAN LUMBER COMPANY, Employer; LUMBER MUTUAL CASUALTY COMPANY OF NEW YORK, Insurance Carrier

Claim No. 5143

(Decided October 19, 1916)

Injuries received by Louis Jackson, resulting in his death, while employed as a lumberman by the A. Sherman Lumber Company.

On May 2, 1916, while Louis Jackson was employed as a lumberman by the A. Sherman Lumber Company, a corporation engaged in the business of logging, he was driving logs on the Raquette river. He was cross-

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ing the river in a boat with ten other men, when the boat swamped, being too heavily loaded, and Jackson, together with five other men, were drowned. His average weekly wage was the sum of ten dollars. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Giles A. Chase, attorney for claimant.

D. Theodore Kelly, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On May 2, 1916, the day when Louis Jackson received the injuries which resulted in his death, he resided at Hogansburg, N. Y., and was employed as a lumber man by the A. Sherman Lumber Co., a corporation engaged in the business of logging, with an office at Potsdam, N. Y.

On said date while Louis Jackson was working for his employer, and was engaged in river driving and logging on the Raquette river, N. Y., and while he was crossing the river in a boat with ten other men, the boat swamped, being too heavily loaded, and Louis Jackson, together with five other men, were drowned.

The average weekly wage of Louis Jackson was the sum of ten dollars.

Louis Jackson was a member of the St. Regis Tribe of Indians of the State of New York, and left him surviving his widow, Charlotte Jackson, aged thirty-two years, and his duly adopted son, Frank Jackson, aged nine years, the claimants herein, and no other child or children under the age of eighteen years. Frank Jackson at the time of his adoption was a member of the St. Regis Tribe of Indians and was duly adopted by Louis Jackson and Charlotte Jackson, his wife, according to the laws and customs of that tribe prior to May 2, 1916.

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Due notice of death was given to the employer.

Award of compensation is hereby made against the A. Sherman Lumber Company, employer, and Lumber Mutual Casualty Company of New York, insurance carrier, to the widow and child of Louis Jackson, deceased employee, as follows: to Charlotte Jackson, widow, aged thirty-two years, at the rate of three dollars per week during widowhood, with two years' compensation in one sum upon remarriage; and to Frank Jackson, adopted son, aged nine years, at the rate of one dollar weekly, until he shall arrive at the age of eighteen years; and to H. B. Hayley, undertaker, in the sum of sixty-eight dollars and fifty cents for the funeral expenses of Louis Jackson, deceased.

In the Matter of the Claim of THERESA LINQUEST and Minor Child, for Compensation under the Workmen's Compensation Law, for the Death of ANDREW LINDQUEST, against HOLLER & SHEPARD, Employer; ROYAL INDEMNITY COMPANY, Insurance Carrier

Claim No. 5478

(Decided October 19, 1916)

Injuries received by Andrew Lindquest, resulting in his death, while employed as a superintendent of construction by Holler & Shepard.

On May 9, 1916, while Andrew Lindquest was employed as a superintendent of construction by John Holler and Stanley Shepard, copartners, operating under the name and style of Holler & Shepard in the general contracting business, he was engaged in contracting as superintendent on a portion of the Barge canal, when his foot slipped and he fell down the bank of the canal and struck on his abdomen. He felt a severe pain and was sent to his home at Fort Edward the same day. He never worked again, and on May 14, 1916, by reason of acute peritonitis, died. Prior to the accident, he had been suffering from a diseased appendix, although that fact was unknown to him. The blow on the abdomen caused a rupture, from which the peritonitis developed. His average weekly wage was the sum of twenty-three dollars and eight cents. An award was made.

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Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Frank J. O'Neill, attorney for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On May 9, 1916, the day when Andrew Lindquest received the injuries which resulted in his death, he resided at Fort Edward, N. Y., and was employed as a superintendent of construction by John Holler and Stanley Shepard, copartners, doing business under the firm name and style of Holler & Shepard, engaged in the business of general contractors, with an office in Rochester, N. Y. Andrew Lindquest was their superintendent of construction at Northumberland, N. Y., where the employer was engaged in constructing a portion of the barge canal under contract No. 73-A.

On said date while Andrew Lindquest was working for his employer on the said construction work, and while he was climbing out of a prism of the barge canal, his foot slipped and he fell down the bank of the canal and struck himself in the abdomen. He felt a severe pain and was sent to his home at Fort Edward the same day. He was thereafter unable to work again and died on May 14, 1916, by reason of an acute peritonitis. Before the accident Andrew Lindquest was suffering from a diseased appendix although the same was unknown to him. By reason of the blow to the abdomen there developed an acute exacerbation on the previously diseased appendix, causing a rupture from which general peritonitis developed, resulting in his death as aforesaid.

The average weekly wage of Andrew Lindquest was the sum of twenty-three dollars and eight cents.

Andrew Lindquest left him surviving his widow, Theresa Lindquest, aged forty-seven years, and his daughter, Agnes Lindquest, born June 14, 1898, and who was of the age of seventeen year and

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upwards at the time of his death, and no other child or children under the age of eighteen years.

Due notice of injury and of death was given to the employer.

Award of compensation is hereby made against Holler & Shepard, employer, and Royal Indemnity Company, insurance carrier, to the widow and daughter of Andrew Lindquest, deceased, as follows: to Theresa Lindquest, widow, aged forty-seven years, at the rate of six dollars, ninety-two and four-tenths cents weekly during widowhood, with two years' compensation in one sum upon remarriage; and to Agnes Linquest, daughter, at the rate of two dollars, thirty and eight-tenths cents weekly, for the period from May 14, 1916 to June 14, 1916, she having arrived at the age of eighteen years on the latter date; and to Charles F. Frederick, undertaker, in the sum of one hundred dollars on account of the funeral expenses of Andrew Lindquest, deceased.

In the Matter of the Claim of JOSEPH E. SUGG, for Compensation under the Workmen's Compensation Law, against ERIE RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 60314

(Decided October 19, 1916)

Injuries received by Joseph E. Sugg while employed as a plumber by the Erie Railroad Company.

On January 14, 1916, Joseph E. Sugg, while employed as a plumber by the Erie Railroad Company at Buffalo, was at work at the Smith street repair yards in that city, removing a water hydrant when a fellow workman lost his hold on the hydrant while they were lifting it. The hydrant fell back into place and caught claimant's right hand causing a compound fracture of several fingers resulting in the permanent loss of the use of the index finger of the right hand. His average weekly wage was the sum of fourteen dollars and forty-two cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Moot, Sprague, Brownell & Marcy, attorneys for employer.

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BY THE COMMISSON.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On January 14, 1916, the day when Joseph E. Sugg received his injuries, he resided at 132 Clare street, Buffalo, N. Y., and was employed as a plumber by Erie Railroad Company, a corporation engaged in the operation of a railroad as a common carrier between points within the State of New York and also between points within the State of New York and points in other States.

On said date while Joseph E. Sugg was working for his employer at the Smith street repair yards in the city of Buffalo and was engaged with two other men in removing a water hydrant in the yard, the other men lost their hold on the hydrant which they were lifting and it fell back into place and thereby caught Sugg's right hand in the socket, causing a compound fracture of the index, second and third fingers, and severe lacerations of the thumb and little finger of his right hand. By reason of these injuries the index finger of the right hand became ankylosed, and Sugg has permanently lost the use of that finger. At the time of the injury, Joseph Sugg was not engaged in interstate commerce.

The average weekly wage of Joseph E. Sugg was the sum of fourteen dollars and forty-two cents.

Due notice of injury was given to the employer.

Award of compensation is hereby made against Erie Railroad Company, employer and self-insurer, to Joseph E. Sugg, injured employee, at the rate of nine dollars and sixty-one cents weekly for a period of forty-six weeks for the equivalent of the loss of the index finger of his right hand.

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In the Matter of the Claim of FRANK SUPPLE, for Compensation under the Workmen's Compensation Law, against ERIE RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 16028

(Decided October 19, 1916)

Injuries received by Frank Supple while employed as a car repairer in the freight department of the Erie Railroad Company.

On May 5, 1916, while Frank Supple was employed as a car repairer by the Erie Railroad Company he was at work at the Eleventh street repair yard at Niagara Falls, N. Y., setting a pair of wheels on a track when his right hand was caught between the axle and the wheel stick crushing two of his fingers. One of the fingers became infected and claimant has suffered a permanent loss of the use of that finger. His average weekly wage was the sum of twelve dollars and sixty-nine cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Moot, Sprague, Brownell & Marcy, attorneys for employer.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On May 5, 1916, the day when Frank Supple received his injuries, he resided at 1538 North avenue, Suspension Bridge, Niagara county, N. Y., and was employed as a car repairer in the freight department of the Erie Railroad Company, a corporation engaged in the operation of a railroad as a common carrier between points within the State of New York and also between points within the State of New York and points in other States.

On said date while Frank Supple was working for his employer

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in the Eleventh street repair yard at Niagara Falls, N. Y., and while he was engaged in setting a pair of wheels on to a track, his second and third fingers of his right hand became caught between the axle and the wheel stick, crushing the same. The index finger of his right hand became infected and resulted in ankylosis, thereby causing a permanent loss of use of that finger. At the time of the accident Frank Supple was not engaged in interstate commerce.

The average weekly wage of Frank Supple was the sum of twelve dollars and sixty-nine cents.

Due notice of injury was given to the employer.

Award of compensation is hereby made against Erie Railroad Company, employer and self-insurer, to Frank Supple, injured employee, at the rate of eight dollars and forty-six cents weekly for a period of forty-six weeks for the equivalent of the loss of the index finger of the right hand.

In the Matter of the Claim of ANTHONY MALEY, for Compensation under the Workmen's Compensation Law, against JOSEPH O'BOYLE, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim Nos. 5847 and 7999

(Decided October 25, 1916)

Question raised as to which of two alleged accidents was the cause of claimant's injuries.

On May 13, 1915, Anthony Maley, the claimant, declares he was injured by a collision between a boat upon which he was sailing and a scow or tug of the Pennsylvania Railroad, whereby he was thrown out of his berth. On the 17th day of May, 1915, he alleges, he was injured by the slipping of a capstan which he was using on a boat, throwing him backwards and causing his injury. The same employer and the same insurance carrier are involved in both injuries. The injury itself consisted of a contusion of his elbow, resulting in infection, which extended to his leg. Claimant seems to have been incapacitated from May 31, 1915, to April 9, 1916,

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a period of 314 days. The claimant has filed with the Commission an election to sue the Pennsylvania Railroad, and he has settled that claim for \$250. The Deputy Commissioner held that there was only one accident, and that the payment of \$250 by the railroad company completely liquidated the claim. The Commission, however, held that the accident of May thirteenth caused the injury, and that the claim should be allowed less the sum of \$250 already paid, leaving an award of \$58. His average weekly wage was the sum of \$10.50.

Two claims have been filed by this claimant, the one for an injury alleged to have happened on May 13, 1915, in which the claimant alleges that he was injured while on board a boat by a collision between the boat upon which he was sailing and a scow or tug of the Pennsylvania Railroad, by which he was thrown out of his berth. The other injury is said to have happened on the 17th of May, 1915, by the slipping or jumping of a capstan which he was using on a boat, throwing him backwards and causing his injury. The same employer and the same insurance carrier is involved in both injuries. The injury in whatever way it happened, seems to have been a rather severe contusion of his elbow, which resulted in cellulitis and later it is claimed in a very serious infection which extended to his leg. Claimant resumed work at his old wages on April 9, 1916, and seems to have been entirely incapacitated from at least May seventeenth, with the exception of ten days when he states that he worked. If this is correct, the claimant's incapacity running from May thirty-first (two weeks after he says he was injured), to April ninth would be 314 days, deducting ten days when he worked, would leave 304 days. If the disability be traced to the injury of May thirteenth instead of May seventeenth, it will of course add four days to this number, making it 308 days. As the plaintiff's wage were \$10.50 per week, his compensation would be \$7 a week, or exactly a dollar a day. He would, therefore, be entitled to compensation amounting to \$304 or \$308 depending on the decision of the question as to which accident caused his disability. The matter is important in another way because the plaintiff under his first injury filed with the Commission an election to sue the Pennsylvania Railroad, and he has settled that claim for \$250. The question to be decided, therefore, is, did his disability result from

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the last injury, in which case the claimant would be entitled to \$304, or if it resulted from the first injury he would be entitled to \$308, but would be compelled to credit upon this sum the sum of \$250 which he received from the Pennsylvania Railroad Company, leaving him \$58. These figures are based upon the supposition that the difficulty with his leg arose from the injury to his arm. Our deputy was of the opinion that there was only one accident, and that the payment of \$250 by the Pennsylvania Railroad Company completely liquidated the claim.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Albert T. Bean, for claimant.

T. Carlisle Jones, for insurance carrier.

LYON, Commissioner.— I think from the medical testimony it must be found that the infection in claimant's leg was due to the injury to his arm. If it were necessary to pass on the question whether the claimant had an injury on May seventeenth, as he alleges, I should find with the claimant that the capstan did jump as he states and that he was injured by it. I am clearly of the opinion, however, judging largely by the statements made by the claimant himself, and those representing him, that the finding must be that the claimant's disability resulted from the accident of May thirteenth and not from the accident of May seventeenth, and that he is, therefore, bound to give credit for the \$250 received by him from the Pennsylvania Railroad leaving still due the sum of \$58. I say I am in favor of this finding judged largely by the statements made by the claimant himself and those representing him. The claimant has not impressed me in the most favorable manner with reference to his frankness. He does not hesitate to charge his former attorney, the representative of the insurance carrier and our stenographer who took the minutes of some of the hearings, with "fixing up the minutes" as he says. He denies his signature to some of the statements in our record, which clearly in my opinion, were signed by him, and in one

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statement shown, him which he admitted had his signature, he took the position that the paper was blank when he signed it and that the matter which preceded it had been filled in since it was signed. It is needless to say that, aside from his own statements, there is not a scintilla of evidence that any one connected with the case has not been straightforward and honorable.

Turning now to the statements from Mr. Maley himself and those representing him, going to show that his disability resulted from the first accident, they are in part, as follows: The employer's first report of injury relative to the first accident is dated the twenty-third day of June, the day of the accident is by him given as May thirteenth and in answer to the question, "Describe in full how the accident occurred?" the employer says, "The boat 'C. C. Harris' was in tow with several other boats of tug 'Winnie' of the Pennsylvania R. R. and tow into dredge at Elizabeth or Carteret, N. J. causing my boat to strike heavily against another boat and knocking out of bed and my elbow struck on a smoothing iron on floor injuring my left arm." The injury is said to be "On left arm or elbow." To the statement, "State nature and extent of injury," the employer answered "Blood poisoning in arm — not amputated." The attending physician's report is signed by Dr. Scol and gives the date of the injury as May thirteenth. In answer to the question "Give an accurate description of the nature and extent of the injury," he replied, "Infected wound of the outer side of left elbow and bruise of the left shoulder." In answer to the statement "State in patient's own words how accident occurred," he says, "While in bed, his boat being towed by a tug, he was thrown out when his boat collided with a dredge." Another physician's report gives the date of the accident as May thirteenth and in answer to the question, "State in patient's own words how the accident occurred," says, "Was knocked out of bed by a collision with a dredge and struck on his elbow evidently causing a fracture of humerus into the joint." The employee's first notice of injury is dated June twenty-third, gives the date of accident as May thirteenth and the cause of the accident, "My boat was in tow of

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P. R. R. tug 'Winnie.' Tow was run against dredge between Elizabeth and Carteret, N. J. I was knocked out of bed and struck my elbow on smoothing iron. Nature and extent of injury—Blood poisoning to my left arm."

Mr. Zabriskie of the firm of Hyland & Zabriskie, attorneys who represented the claimant in his claim against the Pennsylvania Railroad which resulted in the collection of \$250 was called to the stand. A copy of his letter to the Pennsylvania Railroad, dated June 1, 1915, was shown him and he stated that it was a true copy of a letter which he had sent. This letter is in part, as follows: "On May 13, 1915, Captain Anthony Maley of the boat 'C. C. Harris' was in tow of the steam tug 'Winnie' bound for South Amboy. When the tow reached a point between Cataret and Elizabethport, the tug ran into a dredge anchored in the stream and knocked Captain Maley out of bed and he struck his left elbow against an iron on the floor causing injuries which have resulted in blood poisoning." The attorney for the claimant objected strenuously to the use of this letter, on the ground as he said, that it was disreputable to have procured it at all. I am unable to see why the insurance carrier was not clearly within its right in procuring a copy of this letter from the Pennsylvania Railroad or from any other source where it could be found. Certainly neither the Pennsylvania Railroad Company nor the Ætna Life Insurance Company owed any duty to the claimant not to make use of this letter if they saw fit. The letter in and of itself may not be of very much force, but the important thing about it is that Mr. Zabriskie, being called to the stand, stated that he procured the information contained in the part just quoted from the claimant himself, thus fortifying the position taken by the insurance carrier, that the injury to the elbow which resulted in the disability of the claimant, was caused by the first accident, to wit, the accident for which the claimant has received \$250.

It seems to me that these statements, made by the claimant himself, too thoroughly committed him to the proposition that his disability was the result of the accident which happened to him on the thirteenth of May, to permit him to now change his

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position and attribute it to an accident on the seventeenth, so as to escape the giving of credit for the \$250 received from the Pennsylvania Railroad Company. I think the finding of the Deputy Commissioner that his accident was caused by the injury of May thirteenth is correct, but I think his decision to disallow the claim should be modified so as to allow the claim but give credit for the \$250, leaving an award of \$58.

On the 25th day of October, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of LOUIS LANSKY, for Compensation under the Workmen's Compensation Law, against BENSTOCK & ROSENBERG, Employer; THE TRAVELERS' INSURANCE COMPANY, Insurance Carrier

Claim No. 67257

(Decided October 25, 1916)

Injuries received by Louis Lansky while employed as a wagon driver by Benstock & Rosenberg.

On January 25, 1915, Louis Lansky, while employed as a driver of a wagon by Benstock & Rosenberg, who were dealers in scrap iron and metals at Buffalo, N. Y., he was engaged in carrying a bundle of metal weighing about 100 pounds from a freight platform of the Pennsylvania Railroad station at Buffalo to his wagon, when he slipped and fell, striking his left chest on the wagon, receiving contusions of the chest and fractures of three ribs, resulting in acute dilatation of the heart, which disabled him from working until August 16, 1915, for which period he was duly paid. Subsequently it was found he was continuously disabled from the last date until October 25, 1916, and is still disabled. His average weekly wage was the sum of twelve dollars and ninety-eight cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Emil Rubenstein, attorney for claimant.

R. A. Adams, attorney for employer and insurance carrier.

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This claim came on for hearing before the State Industrial Commission at its office, No. 1 Madison avenue, borough of Manhattan, city of New York, on May 3, 1915, May 24, 1915, June 21, 1915, July 7, 1915, August 11, 1915, September 1, 1915 and November 3, 1915. The result of which hearings was to make an award of compensation to the claimant for a period of twenty-seven weeks to August 16, 1915, and the case was thereupon closed. On February 18, 1916 the case was reopened at a hearing at Buffalo, N. Y., and further hearings were held on September 11, 1916, September 18, 1916, and October 25, 1916, at New York, on which last mentioned date the award herein was made.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law and award as follows:

On January 25, 1915, the day when Louis Lansky received his injuries, he resided at 335 Jefferson street, Buffalo, N. Y., and was employed as a driver of a wagon by Benstock & Rosenberg who were in the business of dealing in scrap iron and metals, with a place of business at Clark and William streets, Buffalo, N. Y.

On said date while Louis Dansky was working for his employer and was engaged in carrying a bundle of metal weighing about 100 pounds from the freight platform of the Pennsylvania Railroad Station at Buffalo to his wagon, he slipped and fell between the platform and his wagon, and struck his left chest on the edge of the wagon, thereby receiving contusions of the left chest and a fracture of the costal cartilage of the eighth, ninth and tenth ribs, by reason of which injuries an acute dilatation of the heart resulted, and he thereby became disabled from working from the date of the accident until August 16, 1915, for which period, compensation was duly paid. Upon further examination it was found that he was continuously disabled from August 16, 1915 to October 25, 1916, and on that date he was still disabled by reason of the said injuries. The period of the last mentioned disability is a period of sixty-two weeks.

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The average weekly wage of Louis Lansky was the sum of twelve dollars and ninety-eight cents.

Award of further compensation is hereby made against Benstock & Rosenberg, employer, and the Travelers' Insurance Company, insurance carrier, to Louis Lansky, injured employee, at the rate of eight dollars and sixty-five cents weekly for a period of sixty-two weeks from August 16, 1915, to October 25, 1916, and this case is hereby continued for further hearing.

In the Matter of the Claim of SAMUEL WATTS, for Compensation under the Workmen's Compensation Law, against NEW YORK DOCK COMPANY, Employer; THE LONDON AND LANCASHIRE INDEMNITY Co., Insurance Carrier

Claim No. 35522

(Decided October 25, 1916)

Injuries received by Samuel Watts while employed as a day watchman by New York Dock Company.

On May 3, 1916, while Samuel Watts was employed as a day watchman by the New York Dock Company, a corporation with an office in the city of New York, he was at work at a storehouse on Pioneer street, borough of Brooklyn, and, while hastening to intercept a truck to give it proper direction, he tripped over a raised planking in the floor and fell upon his hand and abdomen, his hand being up against his abdomen, resulting in a serious injury, which rendered an operation necessary, the operation being followed by an abdominal hernia. Watts was removed to the hospital on May tenth, where the operation was performed. He was disabled from work until July 29, 1916, and on the latter date was still disabled. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Wing & Wing, attorneys for employer and insurance carrier.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commis-

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sion makes its conclusions of fact, ruling of law and award as follows:

On May 3, 1916, the day when Samuel Watts received his injuries, he resided at 245 Fifty-third street, borough of Brooklyn, city of New York, and was employed as a day watchman by New York Dock Company, a corporation engaged in the business of operating terminals and warehouses, with an office at 44 Whitehall street, borough of Manhattan, city of New York. The said company operated a storehouse at the foot of Pioneer street, borough of Brooklyn, city of New York, at which place Samuel Watts was employed.

On said date while Samuel Watts was working for his employer at his employer's plant, and while he was hastening to intercept a truck in order to give it proper direction, he tripped over a raised planking in the floor and fell upon his hand and abdomen, his hand being up against his abdomen, and thereby injured his gall-bladder, setting up an acute inflammation which rendered an operation necessary. The operation was followed by an abdominal hernia. Samuel Watts became unconscious at the time of his fall but later recovered and continued working the same day and all of the next day. He was taken to the hospital on May tenth where the said operation was performed and the gall-stones were removed with the result of a post-operative ventral hernia as aforesaid. Samuel Watts was disabled from working from May 6 until July 29, 1916, a period of twelve weeks, and on the latter date was still disabled.

The average weekly wage of Samuel Watts was the sum of ten dollars and ninety-two cents.

Award of compensation is hereby made against New York Dock Company, employer, and the London and Lancashire Indemnity Company, insurance carrier, to Samuel Watts, injured employee, at the rate of seven dollars and twenty-eight cents weekly, for a period of ten weeks from May 20, 1916, to July 29, 1916, and this claim is hereby continued for further hearing.

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In the Matter of the Claim of PATRICK REDDY, for Compensation under the Workmen's Compensation Law, against NATIONAL EXCAVATING AND FOUNDATION Co., Inc., Employer, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Insurance Carrier

Claim No. 54743

(Decided October 25, 1916)

Injuries received by Patrick Reddy while employed by the National Excavating and Foundation Co., Inc., in the city of New York.

Patrick Reddy began business in his own name as an excavator in the city of New York, and subsequently became known as the Patrick Reddy Contracting Company and both individually and as such company having met with reverses, he caused another corporation to be formed, for which he also worked. Having been injured in the course of his employment the only question herein is whether he was an employee of the company or a separate contractor. An award was made.

The claimant, Patrick Reddy, went into the excavating business in the city of New York in 1891 and gradually worked up a business that was of very considerable amount and in the direction of which he apparently came to be skilled and well known. He continued in business for himself until 1912, when his business, which had for some time past been decreasing in volume, became so unprofitable that he was compelled to discontinue. Judgments were entered against him and also against his wife. These judgments against him were numerous and aggregated a large amount. In the latter part of 1912 a petition in bankruptcy was filed against him and he was adjudged bankrupt, filing his schedules in February of the following year. In June, 1912, he caused the Patrick Reddy Contracting Company to be formed, which took up the same lines of business, and this company continued in business until the latter part of 1913. An attempt was made after the filing of the petition in bankruptcy to adjust Mr. Reddy's financial difficulties by way of a composition with his creditors. The composition agreement provided for the payment of twenty-five

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cents on the dollar of his indebtedness, 10 per cent in notes running for six months, 10 per cent in notes running for twelve months and 5 per cent in notes running for eighteen months, these notes all being endorsed by the Patrick Reddy Contracting Company. The attempt to meet these notes proved futile, none of them were ever paid, and the Patrick Reddy Contracting Company from that time on was unable to continue in business. The notes given in composition not being paid, the composition agreement fell through and Mr. Reddy thereupon continued to remain subject to the burden of judgments against him. After the failure of the Patrick Reddy Contracting Company, the two sons of Mr. Reddy, namely, John J. Reddy and Eugene F. Reddy, started to carry on the contracting business as a copartnership, under the name of the Excavating and Foundation Company. The elder of these sons, John J. Reddy, was then twenty-two years of age, and the younger, a little under twenty-one years of age. In this business, carried on by the partnership, the services of Patrick Reddy were availed of, but apparently without any arrangement made for the payment of a salary or wage. This copartnership had secured two or three rather valuable excavating contracts which were assigned and ultimately passed over, in an informal way, to the National Excavating and Foundation Company, Inc., which, it is claimed, is the employer in this proceeding, the corporation having been formed in the latter part of August, 1914, with a capital stock of \$3,000. The testimony from John J. Reddy is, that this corporation when it began business, made an agreement to pay him as president, \$6,000 a year salary, and his younger brother, who held the office of secretary-treasurer, \$1,500 a year salary. Patrick Reddy continued to render services to the corporation, as he had theretofore done to the copartnership, giving the corporation the benefit of his experience and acquaintance with business men, but without any fixed salary, until the latter part of December, the evidence being that he merely received expense money and a little more during the period from the last of August until the latter part of December. The evidence also is that John J. Reddy and Eugene F. Reddy, being unmarried, lived with their parents and devoted a considerable portion of their salaries to

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assist in maintaining the home for the whole family. The claimant says, and in this he is supported by the testimony of John J. Reddy, that in the latter part of December, 1914, they had a conversation, in fact two or three conversations, in which the matter of a salary to Patrick Reddy was discussed, and that it was finally agreed, on or about the twenty-sixth day of December, that Patrick Reddy should be paid a salary of \$150 per week. No record was made of this in any books. In fact, the corporation kept few books and no meetings seem to have been held after the meeting for organization. The claimant is shown to have drawn a very large number of the checks which the corporation issued in payment of bills.

An arrangement was made with the bank where the corporation kept its account that the checks should all receive the signature of Patrick Reddy. He likewise had an oversight of the actual operations of the company, laying out the work when the jobs of excavating were secured, overseeing the installation of the necessary machinery and generally, the direction of the men employed in doing the work. John J. Reddy seems also to have had some duties of this same character, and both the father and son seem to have been instrumental in procuring some of the contracts which the corporation carried out. The claimant was injured in the course of the business of the corporation on the 4th day of February, 1915. The corporation had been insured in another insurance company but this insurance ran off at the end of December, 1914. On the 26th day of January, 1915, the insurance carrier in this proceeding issued a policy of insurance to the National Excavating and Foundation Company, Inc., in the usual form, securing compensation to injured workmen. On the 3d day of February, 1915, the day before Patrick Reddy was injured, a check was drawn against the company's bank account, marked "payroll," for the sum of \$1,120.60 and cashed. The testimony of both Patrick Reddy and his son, John J. Reddy, is, that \$900 of this sum was given to Patrick Reddy in payment for six weeks, compensation at the rate of \$150 per week, in pursuance of their agreement made the previous December. The stub of this check

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has marked on it in pencil the following, "P. R. \$900," showing, it is claimed, that this amount of money was recognized at or about the time when the check was drawn as being in payment of Patrick Reddy's salary. When this pencil memorandum was put on the check stub is not clear. The check immediately preceding this one is dated February eighth, and the check immediately following is dated February sixth, and the next succeeding check is dated February third. The audit of the payroll of the corporation was made long after the accident to Patrick Reddy and does not show that he was reported to the insurance carrier herein as an employee. Testimony was offered as to the prevailing rate of wages for men performing the same services which the claimant performed for the National Excavating and Foundation Company, Inc., and the rate was fixed by the witnesses at about \$40 or \$50 per week. When the claimant's attention was called to the fact that the \$900 would just about pay him salary from the formation of the company to the date of his accident at \$40 per week, the claimant admitted that the fact of his having rendered previous service for several months without compensation was taken into consideration when his salary was fixed at \$150 per week, and the payment of \$900 was made. The insurance carrier resists payment of compensation in this case on the ground that under these circumstances Patrick Reddy was virtually in the position of an employer and not of an employee, that the whole plan of incorporating the business and carrying it on by him and his family was a subterfuge to enable Patrick Reddy to do business for his own benefit, but in such wise as not to be hampered by his judgment creditors, and further, that the proofs of the agreement for a salary are such as not to warrant a finding that the company ever made a valid agreement with him to pay him a salary.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

J. Power Donnelan for claimant.

William H. Hotchkiss, Esq., for insurance carrier.

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LYON, Commissioner.—A large amount of testimony has been taken in this proceeding at the instance of the insurance carrier, and a good deal of time and attention given by it, apparently with a view of making it a test case. In the view of the insurance carrier, at least, the case has about it so many suspicious circumstances as to warrant the careful investigation which it has received, and in this view I concur. I have no doubt that the claimant's unfortunate business ventures, both in his own name and under the name of the Patrick Reddy Contracting Company, and that of his sons in the copartnership, were the primary cause for the incorporation of the National Excavating and Foundation Company, Inc. It is very clear that Mr. Reddy could not do business in his own name, neither could he make use of his wife's name for she also had judgments entered against her. It is probable that his two young sons were not sufficiently familiar with the business and with business methods to make their copartnership very much of a success. No doubt Patrick Reddy was the controlling mind in the National Excavating and Foundation Company, Inc., as he had been in the copartnership and in the Patrick Reddy Contracting Company.

I think it must be found that the National Excavating and Foundation Company, Inc., was incorporated by Patrick Reddy and his family, just as the Patrick Reddy Contracting Company and the copartnership were established, for the primary purpose of utilizing the good will of Patrick Reddy in the excavating business and making use of the experience and skill which he had acquired in that business, and to provide a field where his young sons who were just beginning their business careers could use their time and energy under their father's general direction so as to re-establish if possible, the business which had at one time been profitable. A perfectly laudable purpose, provided it does not invade the rights of other people. I think the question is, therefore, clearly presented — Can a man who has been successful in business and who has acquired skill and reputation in that business, but who has met with business reverses so that he is unable to transact business in his own name, incorporate a company in which such good will as he has gathered to himself by his

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past success in business and his skill and experience can be availed of, and place himself in the position of an employee in that corporation in such wise as to be covered for compensation under the terms of the New York Compensation Law?

It must be remembered that the insurance carrier occupies an entirely different position from that of a judgment creditor of Patrick Reddy attacking the business of the National Excavating and Foundation Company, Inc., on the ground that it was a device to hinder, delay and defraud creditors. It is quite possible that judgment creditors of Mr. Reddy would be able, on the testimony before this Commission, to go back of the incorporation of this company, and establish the proposition that incorporation had been resorted to for the purpose of capitalizing a previously valuable good will, and covering up the real value of Mr. Reddy's services so that the former could not be turned into cash nor the latter reached by an execution against his wages, but it is an entirely different proposition when an insurance carrier who has covered the corporation by its policy is defending against a liability alleged to have arisen out of the risk which it has covered.

There can be no question, in my mind, but that a man skilled in any business or profession who is unfortunate enough to have fallen into financial difficulties resulting in his bankruptcy and inability to secure a discharge, still has a right to make use of his skill and business experience in any place or market in which he can find remunerative employment. The skill and experience of an individual manifestly cannot be reached by execution, nor until it is reduced to a money basis is there any process in equity known to me by which a judgment creditor can control it. Mr. Reddy undoubtedly had the legal right to sell his skill, experience and services to any person or corporation wishing to purchase them. I am unable to see why by the same token he could not himself form a corporation and sell his skill, experience and services to that corporation. It is to be remembered that a corporation is a person and that it is entirely distinct from its employees, its stockholders, its directors and its officers.

We have held in other cases that an officer of a corporation who

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performs the services of an ordinary employee in a hazardous employment, is entitled to compensation for an injury received by him in the actual hazard of the business not connected with his official duties. The claimant in this case, even if it be admitted that the whole plan of incorporating and carrying on the business was gotten up and perfected for his benefit and in order to make a place where he could sell his skill, experience and industry, is in as favorable a position, as it seems to me, for the purpose of invoking the protection of the Compensation Law, as would be a majority stockholder in an ordinary corporation. It was optional with the insurance carrier to accept the risk or not as it saw fit. It might have inquired into the personnel of the management in advance. Such inquiry would no doubt have shown that the incorporation was a family affair.

There is no question that Mr. Reddy was badly hurt in a risk covered by the policy, and while he was performing services such as would entitle an ordinary employee to compensation. I do not think that his relation to the incorporations debars him, *per se*, from relief.

The question whether the claimant has shown himself to have been an employee of the company on a salary is more difficult. According to the testimony of himself and son, he started upon a salary nearly a week before the end of the year 1914. The insurance company which preceded the present insurance carrier upon the risk, had a policy which ran to December 31, 1914, and, therefore, Mr. Reddy's salary for the few days at the end of 1914 should have been included in the payroll of the National Excavating and Foundation Company, Inc., reported to that company. What purports to be a copy of an audit made by the former insurance carrier, the person who made it being dead, was offered in evidence, objected to by the attorney for the claimant and taken subject to the objection, its admissibility, force and effect to be passed upon at the time when the whole case was disposed of. The present insurance carrier also made an audit of the company's books running from January 26, 1915, to June 13, 1915, covering about a week of the time prior to the claimant's injury. In this

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audit also there is no account made of the salary of Patrick Reddy, nor anything to show that he was carried on the payroll of the corporation. This circumstance coupled with the fact of an agreement said to have been made to pay a salary to Patrick Reddy of \$150 per week when the services which he performed were confessedly worth not more than \$40 to \$50 per week, and with the further fact that payment of six weeks' salary was made the day before his injury by a check dated on the third day of February, when the check preceding in the check book was dated of the eighth, certainly has something of a suspicious look. It is to be noted, however, that so far as the date of the check preceding the one covering the \$900 payment is concerned, a reasonable explanation is made, namely, that John J. Reddy having a blank check in his pocket and being asked by his creditor, Nappin, for something on account, drew him the check and then at a later date filled in the stub, this filling in having taken place subsequent to February third. This explanation is given all the more color by the fact that an examination of the complete check book shows that the same break in consecutive dates appeared at other places in the check book. So far as the audit made by the prior insurance company is concerned, I am of the opinion that the first ruling made when the audit was offered by which it was excluded, should be adhered to. No one was produced who could testify how the audit was made or where the data for it was secured or what examination was made to see that the data was correct. It is urged by the insurance carrier that the provisions of law by which the Commission is not bound by common-law or statutory rules of evidence or by technical or formal rules of procedure, ought to permit the introduction of this audit. I think the intent of section 68 of the Compensation Law, providing for liberal rules of evidence before the Commission was intended more particularly to meet the difficulties which injured workmen coming before the Commission often without the aid of counsel, would encounter, and the hardships which would be experienced by workmen long after the accident happened, in securing evidence which meets the technical rules of court procedure. No doubt if the technical rules are

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modified for the benefit of the claimant, they should likewise be modified to the same extent for the benefit of an insurance carrier, but I do not think that an insurance carrier ought to have the legal rules of evidence disregarded where they relate to proof of the existence, continuance or force of the insurance contract rather than proof of the existence and extent of the injury. We have heretofore held that an insurance carrier claiming as a defense that its contract of insurance had been canceled before the injury, should be held to establish that defense by legal evidence, and I think that, on the same principle, the matter of this audit should be established by evidence which a court would accept, before it should be received in evidence. So far as the audit by the insurance carrier in this proceeding is concerned, it is to be noted that the audit was made long after the injury to Patrick Reddy. If there had therefore been any ulterior motive on the part of the National Excavating and Foundation Company, Inc., in returning a false payroll, it would seem that the most obvious thing for the company to do would have been to have put Mr. Reddy on the payroll as returned. Obviously to have done so would have strengthened the case. There is nothing in the record to show why he was not included in that payroll. It is quite possible that whoever gave the data for the audit did not consider that the very short period of Patrick Reddy's salary covered by the audit was sufficient to make it of importance. An employee is not to be deprived of insurance covering compensation because his employer, either by mistake or through fraud does not return him on the payroll submitted for audit, provided he himself is in no way responsible for the mistake or fraud.

The attempt on the part of Patrick Reddy and his son to make the salary \$150 per week instead of \$40 looks suspicious. These men, however, appear to be not very much skilled in the methods of keeping books, their statement on the stand being that they kept practically no books except time books and the stubs of checks, and that these were destroyed as soon as they were supposed to have served their purpose. If, as the insurance carrier claims, the whole matter was a family affair, this may have been some reason for not giving very close attention to the matter of

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putting upon books the exact amount of payments to different members of the family. While the evidence may tend to show that the Reddys were very willing to have Patrick Reddy's connection with the concern minimized for fear of interference from his creditors, I do not find that Patrick Reddy himself was connected with any scheme to prevent his salary being a basis for fixing the premium on the policy of the insurance carrier. There is no evidence that he ever knew anything about the audit which was made by the insurance carrier, nor is there any reason to suppose that he did know of it, except the fact that he was one of the controlling minds in the corporation and that the whole business of the corporation was a carrying out of his prior line of business under the form of a corporation.

There can be no question, I think, but that Patrick Reddy was performing the services of an employee of this corporation. There is no question but that he was paid at what would amount to about forty dollars per week for his services from the inception of the company, and other persons performing the same service testified that the services rendered by Patrick Reddy or similar services were worth about forty dollars per week, and I think the evidence fully warrants a finding that his services were of that value. The evidence is, that Mr. Reddy's injury totally incapacitated him from service for at least four months. I am not at all satisfied that he is now totally incapacitated for service, nor that he cannot from the present render service such as he did before his injury, which will very materially reduce the rate of his compensation. I, therefore, advise an award on the basis of a salary of forty dollars per week, for four months, and that the case be continued for further consideration as to his earning capacity after that period.

On the 25th day of October, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of PATRICK F. McGUIRE, for Compensation under the Workmen's Compensation Law, against BROOKLYN HEIGHTS RAILROAD COMPANY, Employer and Self-Insurer

Claim No. 33161

(Decided October 25, 1916)

Injuries received by Patrick F. McGuire while employed by the Brooklyn Heights Railroad Company at the New York end of the Brooklyn bridge as an inspector.

On December 12, 1915, Patrick F. McGuire was stationed at the Manhattan end of the Brooklyn bridge for the purpose of supervising traffic and on the date of his injury was at a point very near a chamber which had been built to give access to the tube for bringing cars either from the elevated or from the subway to the Brooklyn bridge. The claimant placed in one of these chambers a newspaper and he went to the chamber to see if his paper was still safe. While in the chamber he lost his balance and fell into a tube sustaining his injuries. Claimant had no duties which called him to this chamber but went there for his own purposes. Award denied.

The claimant is an inspector of the Brooklyn Heights Railway Company stationed at the Manhattan end of the Brooklyn bridge for the purpose of supervising traffic, and was located on December twelfth at loops 7 and 8, being the loops nearest the Brooklyn side. Within a few feet of loop 8 there is a chamber which has been built to give access to the tube for bringing the cars from the elevated road or subway loop on to the Brooklyn bridge. This chamber and this tube have never been in use for the purpose for which they were constructed and according to the testimony are now under the control of the city of New York. The chamber has in it several ducts, through which cables will ultimately pass when the tube is put into use. The level of the tube is reached by ladders, one of which seems to go down a few feet and then strike a landing from which another ladder leads to the floor of the tube. Mr. McGuire had previously placed in one of these ducts, for safe keeping, a newspaper which had been given him. On

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December twelfth, at about 11:30 A. M., he went to this chamber and opened the door for the purpose of seeing whether the newspaper was in its place. He found that a portion of it had fallen to what he thought was a ledge below where he had placed it and stepped into the chamber for the purpose of securing this paper. In some way not very clear to himself apparently, he lost his balance and fell into the tube sustaining the injury of which he complains. In a statement signed by him and which he admitted in his testimony was true, he stated, "There was no cars at this time coming in on the loop and I walked over to this shaft which is about four feet from track 8, where I had a newspaper. This newspaper had fallen about three feet down in shaft, on to an iron beam. I went down shaft on iron ladder which is stationary. I let go of ladder to pick up newspaper. When I bent down I thought there was a wall in back of me, lost my balance and fell about twenty-five feet to the bottom."

The claimant admitted that there was no duty toward the railroad company which caused him to go to this shaft or chamber, and the question is, whether the injury arose out of and in the course of his employment.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Claimant, in person.

H. L. Warner for employer.

LYON, Commissioner.—I am unable to see on the testimony of the claimant himself how compensation can be awarded in this case. Whatever may be said about the ultimate intention of using the place where the accident occurred in street car traffic, it is very clear that it never has been used up to this time for traffic; that it is not under the jurisdiction of the Brooklyn Heights Railroad Company, but is owned by the city of New York; that the duties of the claimant did not call him to go to this tube at all and that he went there for purposes of his own entirely disassociated from the duties of his employment. He was not even on the plant

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of his employer when he was injured. The risk which he took in opening the door of the shaft and stepping inside was certainly in no wise connected with his employment, and I advise that an award be denied on the ground that the injury did not arise out of his employment.

On the 25th day of October, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In the Matter of the Claim of FANNIE FISCHER, for Compensation under the Workmen's Compensation Law, for the Death of PETER FISCHER, against DAVID STEVENSON BREWING COMPANY, Employer, and BREWERS' MUTUAL INSURANCE COMPANY, Insurance Carrier

Claim No. 682

(Decided October 25, 1916)

Injuries received by Peter Fischer, resulting in his death, while employed as a cooper by the defending brewing company.

On November 15, 1915, Peter Fischer, while repairing and heading beer barrels for his employer suffered a strain and on December ninth was operated on for a hernia, pneumonia set in on December twenty-fifth, but he recovered and returned home. A few days later he was taken with heart trouble and died on January 23, 1916. An award was denied.

Claim is made by the widow of Peter Fischer who died on January 23, 1916, as the result, as it is claimed, of an accident on or about November 15, 1915. Mr. Fischer's duties consisted of handling and repairing and re-heading beer barrels for his employer. On December 2, 1915, he told some one in connection with the employer that he thought he had a hernia, and on December ninth, he was operated upon. He recovered from the operation fairly well and on December twenty-third, went to his home. On December twenty-fifth, he was taken with pneumonia, from which he made a fair recovery and on or about January eighth was up and about the house. Some four days later he was taken with myocarditis, from which he died on January twenty-

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third. The question to be determined is, whether his death was the result of an injury arising out of and in the course of his employment.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

David Haar, for claimant.

E. L. McManus, Jr., and Mr. Chapman, for insurance carrier.

LYON, Commissioner.—The proof of an injury in the course of his employment and giving rise to a hernia is not very convincing. The employee is said to have stated that he thought he got the hernia about a month before he reported it to his employer, by working among the barrels. The evidence seems to show that Mr. Fischer had nothing to do with other than empty barrels. There is no definite date set when he received the injury, and the fact of his having received an injury seems to rest on a statement made by himself. In any event it does not seem to have made very much impression upon him at the time, and the widow in her claim for compensation is not able to state the date of the injury, but puts the date as above November fifteenth. It is to be noticed that Mr. Fischer made a good recovery from the operation for hernia. As already stated, he was operated upon on the ninth of December. The following is from the hospital record, showing his condition for the time when he was in the hospital:

“Fourth day after the operation: Patient has difficulty in breathing,—patient could not sleep from distressed feeling in throat.

“Fifth day after the operation: Patient slept fairly well — Dr. Aimee visited — ordered gargle — spent fairly comfortable day — patient complains of distressed sensation in throat; Dr. Aimee visited — dressed wound — patient fairly comfortable this P. M.

“Sixth day after the operation: Patient slept well — patient fairly comfortable.

“Seventh day after operation: Not meeting any more of this condition, patient slept well — visited by Dr. Aimee — sutures —

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removed the stitches. Patient spent a comfortable day, doesn't complain of having pain.

"Eighth day after the operation: Patient slept well during the night, patient sponged, bath, alcohol, made comfortable, apparently free from pain — Dr. Aimee visited — very good results. Patient spent fairly comfortable P. M.

"Ninth day after the operation: Slept very well during the night.

"Fourteenth day after the operation: Patient slept fairly well, comfortable this A. M., out of bed — apparently comfortable — free from pain."

It will thus be noticed that Mr. Fischer had recovered from the effects of the operation at the end of two weeks as well as an ordinary patient could be expected. Two days later he was taken with pneumonia while at his home. The record is that he had practically recovered from this pneumonia within two weeks, or about January eighth. Myocarditis set in about four days afterward and resulted in death in about ten or eleven days. Assuming that there is sufficient proof in the case to warrant a finding that Mr. Fischer had an accident about the middle of November which resulted in a hernia, of which I have a good deal of doubt, I am unable to trace his death through the various diseases, with any degree of certainty, back to that accident. It is the opinion of our medical department that pneumonia, if it were caused by the operation, should have developed in four or five days, yet it was sixteen days, and after the patient had been discharged from the hospital before it developed. It seems that the patient had likewise recovered from this disease before the heart trouble developed. I suppose a medical practitioner might trace out a possible causal relation between death and the slight injury causing a small hernia, but while it might be possible, it does not seem to me, on all the evidence, that the fact has been established connecting the death with the injury, and I advise that an award be denied.

On the 25th day of October, 1916, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

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In the Matter of the Claim of RICHARD MCKAY, for Compensation under the Workmen's Compensation Law, against E. G. HINCHMAN COMPANY, Employer; ÆTNA LIFE INSURANCE COMPANY, Insurance Carrier

Claim No. 34183.

(Decided October 30, 1916)

Injuries received by Richard McKay while employed as a steamfitter by the E. G. Hinchman Company.

The claimant, Richard McKay, on January 9, 1916, while employed by the E. G. Hinchman Company, a corporation engaged in installing steam and water heating systems in the borough of Brooklyn, city of New York, was working at the Union Pacific Tea Company building in the said borough, aiding in installing an additional pump, and while trying to dull the edge of a chisel to make a caulking tool and was striking the edge of the chisel with a hammer, a particle of the chisel flew off and punctured his left wrist resulting in a partial paralysis of the left index finger. His average weekly wage was the sum of thirty-one dollars and seventy-three cents. An award was made.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

James B. Henney, attorney for employer and insurance carrier.

By THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On January 9, 1916, the day when Richard McKay received his injuries, he resided at 181 Java street, borough of Brooklyn, city of New York, and was employed as a steamfitter by E. G. Hinchman Company, a corporation engaged in the business of installing steam and water heating systems, with a place of business at 1263 Atlantic avenue, borough of Brooklyn, city of New York.

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On said date while Richard McKay was working for his employer at the building of the Union Pacific Tea Company, 68 Jay street, borough of Brooklyn, city of New York, where his employer had undertaken to install an additional pump in the heating system of the building, and while he was trying to dull the edge of a chisel to make a caulking tool of it, and was striking the elge of the chisel with a hammer, a piece of the chisel flew off and punctured the ligaments of his left wrist, causing an injury which resulted in a partial paralysis of the left index finger. Richard McKay continued working for his employer after the said accident in the drafting department but was unable to do any manual labor, and continued so working until May 29, 1916. Since that date he has been disabled from working at his trade of steam-fitter by reason of said injury until October 28, 1916, a period of twenty-one weeks, and on the last mentioned date he was still disabled.

The average weekly wage of Richard McKay was the sum of thirty-one dollars and seventy-three cents.

Award of compensation is hereby made against the E. G. Hinchman Company, employer, and Ætna Life Insurance Company, insurance carrier, to Richard McKay, injured employee, at the rate of fifteen dollars weekly for a period of weeks from June 17, 1916, to October 28, 1916, and this claim is hereby continued for further hearing.

In the Matter of the Claim of WILLIAM KLEY, for Compensation under the Workmen's Compensation Law, against THE AUTOMOBILE CLUB OF AMERICA, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, Insurance Carrier

Claim No. 3859

(Decided October 30, 1916)

Injuries received by William Kley while employed as an elevator man by The Automobile Club of America.

The claimant, William Kley, on July 5, 1915, while working for his employer at the latter's plant in the city of New York, attempted to

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take a heavy automobile off of an elevator without assistance, strained himself and sustained a hernia. Some days afterward he was operated upon at the hospital and was disabled from working for eight weeks. The claimant had a congenital condition which predisposed him to hernia. His average weekly wage was the sum of eleven dollars and twenty-five cents. An award was made.

Robert W. Bonynge, Chief Counsel to State Industrial Commission.

Alfred W. Andrews, attorney for employer and insurance carrier.

John J. McBride, attorney for claimant.

BY THE COMMISSION.—All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

On July 5, 1916, the day when William Kley received his injuries, he resided at 78 Academy street, Long Island City, and was employed as an elevator man by The Automobile Club of America, a domestic corporation which was in the business of storing and repairing automobiles for pecuniary gain, with a place of business at 242 West Fifty-fifth street, borough of Manhattan, city of New York.

On said date while William Kley was working for his employer at his employer's plant, he attempted to take a heavy automobile off of an elevator without any assistance, and thereby strained himself, receiving a left indirect inguinal hernia. He was able to work for some days after the accident and on July 14, 1915, went to the hospital and was operated upon and was disabled from working from that date until September 8, 1915, a period of eight weeks. At the time William Kley received the above mentioned strain he did not know that he had been injured thereby, and it was not until July thirteenth that he discovered that he had a hernia, at which time he notified the employer. William Kley had a congenital condition which predisposed him to hernia

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but the effort of moving the heavy car aggravated that condition so as to make necessary the operation for hernia.

The average weekly wage of William Kley was the sum of eleven dollars and twenty-five cents.

Award of compensation is hereby made against The Automobile Club of America, employer, and Zurich General Accident and Liability Insurance Company, insurance carrier, to William Kley, injured employee, at the rate of seven dollars and fifty cents weekly for a period of six week from July 28, 1915, to September 8, 1915.

In the Matter of the Claim of HERMAN WINTERS, for Compensation under the Workmen's Compensation Law, against L. MARCOTTE & COMPANY, Employer; PRUDENTIAL CASUALTY COMPANY, Insurance Carrier .

Claim No. 35934

(Decided November 3, 1916)

Injuries received by Herman Winters while employed by L. Marcotte & Company.

On March 24, 1915, the Commission granted an award in this case. Both the employer and the insurance carrier appealed to the Appellate Division of the Supreme Court and on September 12, 1916, the Appellate Division remitted the case to the Commission to determine as to whether claimant is to be excused for his failure to give notice of injury to his employer within ten days of his accident. After a further hearing by the Commission the conclusions of fact were amended by adding a statement that claimant's failure to give notice to his employer had not prejudiced the latter since claimant told his employer's book-keeper of the accident and the person thus told was charged with the duty of handling accident matters for the employer.

Robert W. Bonyng, Chief Counsel to State Industrial Commission.

Jacob Friedman, attorney for claimant.

R. D. Fuller, attorney for employer and insurance carrier.

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By THE COMMISSION.— This matter was decided by the Commission on March 24, 1915, granting an award. The employer and insurance carrier appealed to the Appellate Division of the Supreme Court, and on September 12, 1916, said Appellate Division remitted this case to the Commission to make a determination as to whether the claimant is to be excused for his failure to give notice of injury to his employer within ten days of his accident. A hearing to determine this question was held at the office of the State Industrial Commission, at No. 230 Fifth avenue, borough of Manhattan, city of New York, on October 30, 1915, and again on November 3, 1916, at which time the evidence in the case was taken and the following decision was arrived at:

The action of the Commission was as follows:

Resolved, That the findings of fact, ruling of law and award heretofore made herein on March 24, 1915, be amended by adding to the conclusions of fact, the following paragraph 5, and by adding the following decision:

“ 5. Herman Winters failed to give written notice of injury to his employer within ten days of the said accident, but his failure to do so has not prejudiced the employer, since he told the bookkeeper of his employer of the accident and its consequences within ten days of the accident, and such bookkeeper was the person duly charged with the handling of accident matters for the employer.”

Resolved, That the following decision be added to the said conclusions of fact, ruling of law and award, to wit:

“ The failure of Herman Winters to give due notice of injury to his employer is hereby excused on the ground that the employer was not prejudiced thereby.”

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In the Matter of the Claim of ARTHUR H. HARGRAVES, for Compensation under the Workmen's Compensation Law, against GEORGE F. SHEVLIN MANUFACTURING COMPANY, Employer; ZURICH GENERAL ACCIDENT AND LIABILITY INSURANCE COMPANY, LTD., and STANDARD ACCIDENT INSURANCE COMPANY, Insurance Carrier

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(Decided November 6, 1916)

Injuries received by Arthur H. Hargraves while employed as a machinist by George F. Shevlin Manufacturing Company.

The claimant, Arthur H. Hargraves, on December 17, 1915, was employed as a machinist by George F. Shevlin Manufacturing Company, a corporation engaged in the operation of a foundry and machine shop at Saratoga Springs, N. Y. In August of that year the Bankruptcy Court for the Northern District of New York appointed a receiver for the employing company. The receiver was authorized to borrow \$10,000 and to issue certificates against the same, which sum was to become a first lien on the assets of the company and the receiver was ordered to continue the business until further order of the court. At the time of the accident the company had an insurance policy of the Zurich General Accident and Liability Insurance Company for payments under the Compensation Law to employees of the company for the period from April 20, 1915, to April 20, 1916. The receiver, through his attorney, caused the cancellation of this policy. It was sent to the home office and a binder issued to the receiver therefor. The insurance company refused to issue a new policy. Agents for the Zurich General Accident and Liability Insurance Company were also agents for the Standard Accident Insurance Company and a binder of the latter company was given to the receiver's attorney the first part of October, 1915. At the time of the accident to claimant both policies of insurance were in full force and effect. The claimant's injuries were received in pulling up bolts on a table of a boring sill causing the injury complained of. His average weekly wage was the sum of nineteen dollars and forty-seven cents. An award was made.

This claim came on for hearing before the State Industrial Commission at its office at Albany, N. Y., on April 19, 1916, and May 16, 1916; and at Saratoga, N. Y., on June 25, 1916; and at Albany, N. Y., on August 11, 1916; and at its office, No. 230 Fifth avenue, borough of Manhattan, city of New York, on November 6, 1916.

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Robert W. Bonynge, Counsel to State Industrial Commission.

Neile F. Towner, attorney for Standard Accident Insurance Company.

Alfred W. Andrews, attorney for Zurich General Accident and Liability Insurance Company.

BY THE COMMISSION.— All the evidence submitted before the Commission having been heard and duly considered, the Commission makes its conclusions of fact, ruling of law, and award as follows:

1. On December 17, 1915, the day when Arthur H. Hargraves received his injuries, he resided at 57 Lincoln avenue, Saratoga Springs, N. Y., and was employed as a machinist by George F. Shevlin Manufacturing Company, a corporation engaged in the operation of a foundry and machine shops, with a plant and place of business on Ballston avenue, Saratoga Springs, N. Y. On August 31, 1915, the judge of the Court of Bankruptcy for the Northern District of New York appointed a receiver in bankruptcy for the said company. The receiver was authorized to borrow \$10,000 and to issue certificates against the same, which sum was to become a first lien on the assets of the company, and the company was ordered to deliver all its assets to the receiver, and the receiver was ordered to continue the business until further order of the court. At the time of the accident the said company had in its possession an insurance policy of the Zurich General Accident and Liability Insurance Company for the payment of compensation under the Compensation Law to employees of the said company, which policy covered the period from midnight, April 20, 1915, to midnight April 20, 1916. On September 9, 1915, the receiver, through his attorney, delivered the policy of the Zurich General Accident and Liability Insurance Company to the agents of the Zurich General Accident and Liability Insurance Company for cancellation and the agents sent the policy to the home office of the Zurich General Accident and Liability Insurance Company at Chicago, asking for the cancellation of the same and the issuance of a policy in favor of the receiver. The said agents of the Zurich General Accident and Liability

